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SOME REFLECTIONS ABOUT THE OPINION AND DECREE IN THE STANDARD OIL CASE.

There runs through the opinion of Judge Sanborn in the Standard Oil Company case the dominant idea in the Northern Securities case and the force of the decree appears to expend itself in the mere dissolution of a holding trust. *United States v. Standard Oil Co. of N. J.*, 173 Fed. 177.

And this result does not seem to appear to the judge to be of any more than relative importance.

Thus he speaks, in paragraph 4 of his opinion, of counsel arguing "with persuasive force that the transfer of the stock of the nineteen corporations to the principal company brought no substantial restriction of competition, because the owners of that stock had and exercised the same power of restraint before that transfer that was vested in the Standard Oil Company of New Jersey thereafter." To this the court replied that the power of restriction became greater, more easily and quickly exercised and hence more effective, than it could have been in the hands of three thousand scattered stockholders. We take it that the court admits, that before the holding trust there was restriction and the holding trust made it operate more practically and, therefore, more harmfully.

If, therefore, there may be a relegation to former conditions, there is strong implication that the snake of the declared evil has not been killed, but only scotched.

The great mass of evidence in the case related in great part to what had been done prior to 1899, when the stock of subsidiary companies came to be held by the Standard Oil Company, and it was shown that this great company had quite as complete, though a somewhat more cumbersome, control of things, than afterwards.

But all through the opinion and the decree comes the thought to the reader, that but for the holding trust of 1899 the government would have failed.

The decree says there is an illegal combination to monopolize trade by the destruction of competition among the principal and subsidiary companies, all potential competitors. Its operative part is, that whatever may arise out of stifling competition, as the result of stock of the subsidiary companies being held by the principal company must stop and the former be disenfranchised. This stock is declared dumb, at least for awhile, and its prior commands are ordered to be disobeyed. Further than that the stock is declared to be in the hands of an illegal holder which is forbidden to receive or be paid any dividends.

It is not declared valueless, but impounded. For whom is it impounded? Naturally it might be supposed, that, if it had been acquired illegally, it ought to be restored to the hands from which it came. This, however, is not the decree, but it *may*, not *must*, be distributed to the shareholders of the Standard Oil Company ratably.

Now let us see how this works out. The Standard Oil Company of New Jersey raises its capitalization from \$10,000,000 to \$100,000,000, and exchanges the excess for stock of the subsidiary companies. This exchange is made for the purpose of vesting control of all the companies in one company, so as to stifle all competition between themselves. Such exchange was illegal. The *status quo*, then, should be restored. Naturally, everybody should surrender their illegally issued stock for what they had given in exchange therefor. Under the court's decree, however, they keep what they got from the Standard Oil Company, and share ratably with its original stockholders in the new distribution. To the extent that these original stockholders come in, the holdings of the exchanging stockholders may be less than double what they had before, and the original stockholders are given stock they never asked for.

It is to be said, therefore, that corporation assets being thus distributed, corporate capi-

tal has been reduced not by any statutory method, but by a sort of ukase of a federal court, operating on a state corporation.

But what is the effect, in law, of this? It seems to us to be a dissolution, *pro tanto*, of the Standard Oil Company of New Jersey, a thing never prayed for by the bill in the case, and a relief which a federal court is powerless to grant.

Even, if it be said no harm is done by this to the exchanging shareholders, the same might not be said as to other stockholders, the 3,000 of whom the opinion speaks. 2,993 of these were not parties to the suit. It would look, therefore, like the court either had the right to direct a re-exchange of stocks, or to give original stockholders in subsidiary companies the right to demand a re-exchange, or that it was powerless to touch that stock at all. If stock is re-exchanged that which was illegally issued should be canceled.

Furthermore, a re-exchange would be the more certain way to extinguish all vestige of the unlawful combination and restore the *status quo*. As it is, there remain some of the spoils of the old evil, unless this reduction of assets makes the Standard stock of no value. If it does, the old stock is confiscated.

The court's plan has another curious result. It takes away from the principal corporation the entire basis of its increased capitalization and leaves its capital stock as before. Certainly an over-capitalization. Perhaps this is not confiscation, but does it not resemble it, in a way? If that great concern would be thus left unable to pay its creditors, it might look very much to them, as if it were confiscation.

But, taking it, that the principle established by the Northern Securities case is the cornerstone of the government's success before the Circuit Court of Appeals, then speculation may well be indulged, whether it will control in this case in the Supreme Court.

There seems large room for contention, that it does not extend to this case. It is to be remembered that this principle was sustained by a bare majority of the court,

and changes on the bench have taken place and more are expected.

The minority of four planted their dissent squarely upon the Sugar Refineries case, and the majority, to escape its effect, regarded the Securities Company as having no other business in life than to be a "custodian," organized for this purpose. Justice Harlan said: "There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact one of that kind." Justice Brewer thought the Securities Company was created as a mere instrumentality like the "appointment of a committee to fix rates."

But the principal company in this case was a going concern and the stock it exchanged for other stock had a positive value based on its own operations. The principle in the Northern Securities case may save the government in the higher court, but it requires at least to be extended, as the language of Justice Harlan, which we quote, does not seem entirely sufficient.

The shadow of the Sugar Refineries case looms large over the final event, for all of the majority argument in the Northern Securities Company case was to the effect that that company was a mere instrumentality, without any assets in fact. It was a sort of dummy argument which could never be asserted of the Standard Oil Company of New Jersey.

NOTES OF IMPORTANT DECISIONS.

DAMAGES—CASES OF INSTRUCTIONS OF NOMINAL DAMAGES FOR DEATH.—The case of *Scherer v. Schälberg* (N. Dak.), 122 N. W. 1000, discusses, but does not decide, because unnecessary in the case, the question of instructing juries to award merely nominal damages in the case of the death of a female infant. The opinion leans very plainly to the view that such damages ought to be declared the measure of recovery in such a case. The court says: "It is conceded that in actions of this nature juries are not confined to the consideration of the evidence alone, as they are in many other cases, but they may exercise a much wider latitude in applying their own knowledge and experience than would be proper in most other cases, but it is apparent that

no evidence, no knowledge or experience of the jurors could justify them in saying that in case of the child's continued life its earning capacity would have exceeded the expenditures necessary in its maintenance and education. On the contrary, the experience of mankind in civilized communities warrants the conclusion that its net earning capacity would most likely be a negative quantity. When it is impossible to arrive at a verdict except by speculation or surmise, guesswork or conjecture, the case should be taken from the jury."

Such a declaration as this appears to us to smack very strongly of judicial legislation. The legislature knew, as all men know, that nothing but the divine gift of prophecy may tell whether a child of almost any age will cost more for its education and maintenance than it will ever earn, and yet parents are given a right of action for their deaths. It did not limit age or sex, and it looks like judicial interpolation for the court to do this. A rich man's child might possibly bring to him in pecuniary return more than luxuries supplied to him, and the sickness or sloth of the poor man's child might never bring a penny to the household, which had given him a meagre subsistence. Industrial conditions might by some be thought to insure a more certain return from female, than male minors. It is "speculation, surmise, guesswork and conjecture" in every case about minors, just as there is about the future earnings of a husband or father. With a child the guesswork is merely intensified or accentuated and multiplied, but it is the law's policy and courts are not legislators, or, at least, they should not be.

Swift & Co. v. Johnson, 138 Fed. 867, 71 C. C. A. 619, was a case of suit by the administrator for death of a sixteen-year old infant, and the court excluded recovery on the ground that the father, to whom the money would go, had practically abandoned his family. The court reviews Minnesota cases at length in an endeavor to show they are in accord with it, because the action was under the statute of that state, and not finding itself fully satisfied on this question said, in effect, that if it were mistaken, it would not enforce the statute except for damages purely compensatory, and cites several cases as to this. In other words while sitting to enforce state law, it will not enforce what a state's highest court says ought to be enforced.

There seems something of a tendency in courts to emasculate the statute in a way that would greatly justify legislatures in fixing an amount in all of these cases, and grading same on some sort of theory as to age of minor and to whom the recovery should go.

One recovery for death as well as another is necessarily based largely on speculation, and it would save greatly in every way to take out of this beneficent advantage on the common law as much uncertainty in its application as possible.

APPEAL AND ERROR—MEANING OF "PERSON AGGRIEVED."—The Wisconsin statute limits the right of appeal to certain specified official persons and to "any person aggrieved" by the determination which a court may make. The case of *Sanborn v. Carpenter*, 123 N. W. 144, shows that a non-resident of Wisconsin, the sister of an alleged incompetent, who with another sister and brother are next of kin, applied to a county court for the appointment of a guardian to conserve the property of such party. The application, being granted, the circuit court reversed the county court's decision. Appeal was then taken by the petitioner to the supreme court and the alleged incompetent moved its dismissal on the ground that petitioner had no interest and was not, therefore, "aggrieved." The court refers to administrators, guardians, etc., being expressly authorized by statute to appeal and that the enumeration does not expressly embrace such a party as the petitioner.

The court argues that the statutes are themselves "significant of a marked distinction as to the conditions and persons that may originally arouse the duty of a county court to inquire into competency and those which may justify attack on its decisions, and thereby greatly enhance and aggravate the injury to the subject of the charge by multiplication of litigation and expense."

The court further said: "It is urged that the word 'aggrieved' should be extended to those upon whom will be cast the legal duty to support the alleged incompetent in case of the dissipation of his property, or to those who being directly and legally dependent upon him for support will be deprived of their legal right to such support." It was admitted that a prior Wisconsin decision supported "this general contention favorably" in favor of a son, a resident of the state, on whom the law devolved the duty of supporting his father.

But it was said: "The distinction in the case of a mere next of kin or heir apparent is that the burden cast on a son is an injury to a right presently existing in the person seeking to protect it while the mere heir apparent has no present legal right whatsoever, but a mere conjectural expectancy." It might, however, be claimed, that the expectancy while somewhat conjectural is so, if the alleged incompetent is really such, only on the

question of survivorship, and we doubt whether that conjecture ought to control so absolutely. A petitioner ought to be regarded somewhat like the representative of all those who may be heirs. In favor of such a construction is also the presumed benefit to one who is incompetent. Besides some allowance ought to be made for affection, and its disinterested purpose. The right to initiate proceedings at all seems to take these things into some account and to recognize some measure of interest upon which "aggrieved" might be based.

That mere officials are expressly provided does not seem to us to exclude this idea, as officials as such are like corporations, devoid of souls and of sentiment. It may also be further said that the theory of such a proceeding is that it is for the supposed benefit of incompetents that they are allowed at all and petitioner is but representing the true interests of the incompetent in seeking to obtain a proper judgment and the incompetent is really "aggrieved" by any other judgment. The law may presume that one bound by ties of affection will not abuse a privilege and the same policy that allows the beginning of proceedings ought to permit their prosecution in all proper jurisdictions.

EMPLOYER'S LIABILITY ACT—ITS VALIDITY IN THE TERRITORIES.—The federal supreme court has lately sustained the validity of the Federal Employer's Liability Act as to intra-territorial business, *El Paso & N. E. R. Co. v. Guitierrez*, (decided Nov. 15, 1909). The cause of action arose under the act as it formerly existed, and was declared unconstitutional as a regulation of interstate commerce business.

The principal contentions against validity were as to separability and whether, if separable, it was "plain that congress would have enacted the legislation had the act been limited to the regulation of the liability to employees engaged in commerce within the District of Columbia and the Territories." Justice Day wrote the opinion which was unanimous.

While the court sustains the act from both points of view its reason for doing so does not appear to us to meet the test of the rule of intention, as above declared. Thus the court says: "Bearing in mind the reluctance with which this court interferes with the action of a co-ordinate branch of the government, and its duty, no less than its disposition, to sustain the enactment of the national legislature, except in clear cases of invalidity, we reach the conclusion, that in the aspect of the act now under consideration the congress proceeded

within its constitutional power, and with the intention to regulate the matter in the District and Territories irrespective of the interstate feature of the act."

Were such an announcement to proceed from a less august tribunal, we might suspect it to be somewhat sloppy and lacking in some essential feature of proper judicature. "Reluctance" in doing this, that, or the other thing seems to be somewhat overworked by our great court. A court sits to declare legal rights and, if it has any lack of disposition to do this, it should surmount it. If reluctance gets in in one place, it may get in another, but where, no one may prophesy. It was "reluctance" largely that started the habit of this court in having independent opinions in the enforcement of state law, the pursuit of which has given to the alien and non-resident judge-made law, when others are bound by statutes.

LIABILITY OF BANKS TO THEIR DEPOSITORS FOR MISPAYMENTS OF CHECKS, AND RIGHT OF REIMBURSEMENT FOR MISPAYMENT AS BETWEEN BANKS.

The banking practice of accompanying depositors' returned cancelled checks with a notice that errors or mispayments will be held to have been waived except in so far as the depositor shall, within a certain time, bring them to the attention of the bank, naturally suggests an inquiry into the state of the existing law. The object of the present paper is to examine the liability of banks to their depositors upon mispaid checks, and the right of recourse of banks making mispayments against prior banks which have dealt with the mispaid checks.

I.

The general rule is almost undisputed, that a bank cannot charge its depositor upon a check, unless the check was drawn by the depositor, and was paid in the amount fixed by the depositor, to the person intended by the depositor.¹

(1) *Jannin v. London & S. F. Bank*, 92 Cal. 14; *Georgia, &c. Co. v. Love, &c.*, 85 Ga. 203; *German Savings Bank v. Citizens National Bank*, 101 Ia. 530; *Murphy v. Metropolitan*

Under this rule it is even held that payment of a check to a payee bearing the same name as the payee intended by the drawer is a mispayment;² although this view has been earnestly criticised by at least one text-writer.³ A payment to the person actually intended by the drawer is, however, a sufficient payment, even though this person masqueraded under a false name.⁴ If the depositor uses a rubber stamp for signing his checks, it is a mispayment to honor a check to which that stamp was affixed surreptitiously.⁵

Since the rule throws the responsibility for mispayment upon the bank, regardless of actual negligence, of course, it follows *a fortiori* that where the bank has been actually negligent, the depositor cannot be charged upon the check.⁶

II.

Although all the requisites of the general rule stated above may be lacking, yet a depositor is barred from recovery of the amount paid out by the bank on a check when he himself has been negligent in permitting the bank to be deceived in relation to the check. Thus in *Young v. Grote*,⁷ the drawer was held bound upon a check in which a space had been left before the amounts, which enabled the guilty person to change the amount; in *Wood v. Boylston*

National Bank,⁸ the owner of a negotiable instrument indorsed in blank and intrusted to an agent for collection, was barred from objecting to the bank's application of the check upon its own account against the agent; and in *Smith v. Mechanics & C. Bank*,⁹ it was held negligence to deliver a check to a stranger under suspicious circumstances.

On the other hand, in *Colonial Bank v. Marshall*,¹⁰ following *Scholfield v. Lindesborough*,¹¹ drawer who left spaces before the amounts on the check was found not negligent; in *Critten v. Chemical Bank*,¹² drawer who signed a check in which his clerk had left such spaces was held not negligent; in *Mackintosh v. Eliot National Bank and Robb v. Penn. Ins. Co.*, *ubi supra*, it was found not to be negligence for the drawer to have a rubber-stamp fac simile of his signature which he customarily used in signing checks; and there are, of course, other cases in which the drawer has on the facts been absolved from negligence.¹³

It is a natural corollary to the foregoing general principles, that a depositor may so act, subsequent to the mispayment by the bank, that he will be held to have ratified the mispayment.¹⁴

III.

Although the bank may have made a mispayment, which is not excused by any negligence on the part of the drawer, or ratified subsequently by the drawer, still the bank may have at least a partial defense against the drawer, if he seeks to have his deposit reimbursed for the mispayment. This defense originates when the depositor fails to use ordinary care in examining re-

Nat. Bank, 191 Mass. 159; *Mechanics Nat. Bank v. Harter*, 63 N. J. L. 578; *Morgan v. Bank*, 11 N. Y. 404; *Citizens Nat. Bank v. Importers & Traders Bank*, 119 N. Y. 195; *Dodge v. Nat. Exchange Bank*, 20 Oh. St. 234, 30 Oh. St. 1; *United Security & Co. v. Central Nat. Bank*, 185 Pa. 586; *Brixen v. Deseret Nat. Bank*, 5 Utah, 504; *Hardy v. Chesapeake Bank*, 51 Md. 585.

(2) *Graves v. American Exchange Bank*, 17 N. Y. 205; *Bank of Commerce v. Ginocchio*, 27 Mo. App. 661.

(3) *Morse on Banks & Banking*, Section 474. "Clearly justice demands that the drawer should suffer in case of error induced by such a state of affairs. . . . The technical rule of law declaring the indorsement a forgery is too strong for the principles of justice."

(4) *Robertson v. Coleman*, 141 Mass. 231.

(5) *Mackintosh v. Eliot National Bank*, 106 Mass. 441; *Robb v. Penn. Ins. Co.*, 186 Penn. 456. Latter case, criticised adversely in 37 Am. Law Rev. n. s. 745; commented on, *Zane on Banks and Banking*, page 265n.

(6) *Kearny v. Metropolitan Trust Co.*, 186 N. Y. 611; *National Dredging Co. v. President & C. of National Bank*, 69 Atl. 607 (Del. 1908).

(7) 4 Bing. 253, 13 E. C. L. 420.

(8) 129 Mass. 358.

(9) 6 La. Ann. 610.

(10) 1906, A. C. 559.

(11) 1896, A. C. 514.

(12) 171 N. Y. 219.

(13) *Winslow v. Everett Nat. Bank*, 171 Mass. 534; *Belknap v. Nat. Bank of North America*, 100 Mass. 376; *Leavitt v. Stanton*, Hill & D. Supp. (N. Y.) 413; *National Bank v. Nolting*, 94 Va. 263.

(14) *Charles River Nat. Bank v. Davis*, 100 Mass. 413; *De Fariet v. Bank of America*, 23 La. Ann. 310.

turned checks, discovering mispayments, and reporting them to the bank.¹⁵ It is, however, only a defense available in so far as the bank has been actually damaged by the depositor's neglect,¹⁶ although the prevention of prompt recourse against a forger may be such damage as to give the bank a complete defense.¹⁷

Among the cases where the bank has claimed a defense by the foregoing principle are those where the depositor has neglected to discover a forgery until some time has elapsed;¹⁸ neglected to make an examination of the returned checks which would have disclosed alterations;¹⁹ failed to discover a forgery of his own signature;²⁰ delayed in notifying the bank after the discovery of a mispayment.²¹

To be sure there are some cases which seem to state that a depositor owes no duty of examining the returned checks;²² but these cases are to be explained on their facts. Since the negligence of the drawer is a question of fact, and the duty of examination is only to make such an exami-

nation as a reasonable man would make, it may be laid down almost as a rule of law that it is not negligence for the drawer to fail to detect forged indorsements by payees;²³ it therefore happens that some of the cases deny the duty of a depositor to examine his returned checks, when the actual decision is, that the depositor will be absolved from negligence in not making an examination, where the examination would have failed to detect mispayments on forged indorsements.²⁴ For instance, it is not negligence for the drawer to fail to discover the forging of a payee's signature, when the signature is unfamiliar to the drawer;²⁵ or when the forgery of the payee's indorsement is unsuspected.²⁶

A special question arises, when the drawer has a confidential clerk, to whom he intrusts the examination of the returned checks, and thus gives him an opportunity of concealing from the drawer mispayments by which the clerk has profited. In some of the cases, this has been held to be such negligence on the part of the depositor as will give the bank a defense;²⁷ other cases have held squarely to the contrary.²⁸ Probably the cases may be explained on their facts. The negligence of the depositor is a question of fact, and while it might be culpable for a small depositor to fail to examine his own checks, it might well be

(15) *Morgan v. United States, &c., Co.*, 109 N. Y. Supp. 274; *National Bank v. Nolting*, 94 Va. 263; *First Nat. Bank v. Rich Electric Co.*, 106 Va. 347; and cases cited below.

(16) *Birmingham First Nat. Bank v. Allen*, 100 Ala. 476; *Critten v. Chemical Bank*, ubi supra; *Brixen v. Deseret Nat. Bank*, ubi supra; *President &c. v. National Dredging Co.*, 69 Atl. 607 (Del. 1908).

(17) *Leather Mf. Bank v. Morgan*, 117 U. S. 115.

(18) *Atlanta Nat. Bank v. Burke*, 81 Ga. 597 (delay of three years held excusable); *Crawfordsville First Nat. Bank v. Lafayette First Nat. Bank*, 4 Ind. App. 355; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Kenneth &c. Co. v. Nat. Bank*, 96 Mo. App. 125; *First Nat. Bank v. Rich Electric Co.*, ubi supra.

(19) *Dana v. National Bank of the Republic*, 132 Mass. 156; *Critten v. Chemical Bank*, ubi supra.

(20) *Leather Mf. Bank v. Morgan*, 117 U. S. 96.

(21) *Cook v. United States*, 91 U. S. 389, 402; *United States v. Nat. Exchange Bank*, 45 Fed. 163; *St. Louis v. Allen*, 59 Mo. 310; *N. Y. Third Nat. Bank v. Mechanics Nat. Bank*, 76 Hun (N. Y.), 475; *Chambers v. Union Nat. Bank*, 78 Pa. St. 203; *Crum v. First Nat. Bank*, 219 Pa. 310. *McNeely v. Bank North America*, 221 Pa. 588; *Brixen v. Deseret Nat. Bank*, ubi supra.

(22) *German Savings Bank v. Citizens Nat. Bank*, 101 Iowa, 630; *Manufacturers Nat. Bank v. Barnes*, 65 Ill. 69; *Weisser v. Deucon*, 10 N. Y. 68; *Welsh v. German American Bank*, 73 N. Y. 424; *National Bank v. Tappan*, 6 Kan. 466.

(23) *Jordan Marsh Co. v. National Security Bank* (Mass. 1909), 87 N. E. 740; *Mechanics Nat. Bank v. Harter*, 63 N. J. L. 578; *Welch v. German American Bank*, 73 N. Y. 424; *Bank of North America v. Merchants Nat. Bank*, 91 N. Y. 106; *United Sec. L. & T. Co. v. Central Nat. Bank*, 185 Pa. St. 556.

(24) See cases in notes 16 and 17 above, and *Pollard v. Wellford*, 99 Tenn. 113.

(25) *Brixen v. Deseret Nat. Bank*, 5 Utah, 504.

(26) *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159; *Jannin v. London & S. F. Bank*, 92 Cal. 14.

(27) *Dana v. Nat. Bank of the Republic*, 132 Mass. 156; *Leather Mf. Bank v. Morgan*, 117 U. S. 96; *Birmingham First Nat. Bank v. Allen*, 100 Ala. 476.

(28) *Kenneth &c., Co. v. Nat. Bank of Republic*, 96 Mo. App. 125; *Clark v. Nat. Shoe & Leather Bank*, 32 App. D. (N. Y.) 316, aff. 164 N. Y. 498; *Hardy v. Chem. Bank*, 51 Md. 585; *Morgan v. Southwestern Nat. Bank*, 193 Pa. St. 1. See also *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516.

entirely proper for a capitalist of extended interests to entrust the task to a carefully chosen subordinate.

IV.

When the bank has been compelled to reimburse its depositor's account for the amount of a mispaid check, the bank naturally seeks to follow up prior parties who have dealt with the check.

It is obvious, of course, that the bank can bring action against the prior party if that party was *mala fides*; it is also obvious that the bank has an action against a prior party who was actually negligent.²⁹ It has been held that it is such negligence for a bank to pay a check to an unknown person without requiring his identification.³⁰

Where the drawee bank seeks reimbursement from a prior bank, which has been neither *mala fides* nor negligent, the right of recovery depends largely upon the character of the mispayment, and upon the relation of the prior bank to the check. If the check was forged in its inception, the famous "doctrine of *Price v. Neal*" prevents the drawee from having recourse against any prior innocent party.³¹ This doctrine is variously explained; the broad statement of it is, that where equities are equal, the law will leave the loss where it has fallen; the narrower explanation is, that a bank is presumed to know the signature

of its depositor. The doctrine seems at first blush to be contrary to the well-known principle that money paid out under a mistake of fact may be recovered back; but whether or not that principle can be qualified in general by an examination into the nature of the mistake of fact in a given case, it certainly is fairly well established, in the case of bank checks, that where the mistake of fact is a mistake as to the genuineness of a drawer's signature, mutual as between drawer's bank and the holder of the check, the loss will be left where it falls.

The question of what is a payment sometimes becomes material, where the forgery is discovered by the drawee bank immediately after the check has been received by it. It is hardly within the scope of the present paper to inquire far into this question, but it is perhaps pertinent to point out that a payment by one bank to another through the clearing house is not final, but may be rescinded, at least during a time allowed by the rules thereof, and probably even subsequent to that time, if the other bank has not in the meantime changed its position.³²

Where the drawee bank makes a payment on a check to which the payee's indorsement has been forged, it may obtain reimbursement from a prior bank, at least where the prior bank has indorsed the check generally, and not as an agent for collection.³³ So also it may recover the excess of a "raised check" over the amount for which it was properly drawn.³⁴

(29) *Marshalltown First Nat. Bank v. Marshalltown Savings Bank*, 107 Ia. 329; *Quincy First Nat. Bank v. Ricker*, 71 Ill. 439; *Nat. Bank of North America v. Bangs*, 106 Mass. 441; *First Nat. Bank of Danvers v. First Nat. Bank of Salem*, 151 Mass. 280; *Ellis v. Ohio Life Ins. Co.*, 4 Oh. St. 628; *Orleans First Nat. Bank v. State Bank*, 22 Neb. 769; *People's Bank v. Franklin Bank*, 88 Tenn. 299; *Rowan v. San Antonio Nat. Bank*, 63 Tex. 610; *Canadian Bank of Comm. v. Bingham*, 30 Wash. 484.

(30) *People's Bank v. Franklin Bank*, 88 Tenn. 299.

(31) A few of the cases illustrating the rule are: *Price v. Neal*, 3 Burr. 355; *Gloucester Bank v. Salem Bank*, 17 Mass. 42; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392; *Bank of St. Albans v. Farmers & C. Bank*, 10 Vt. 141; *Neal v. Coburn*, 92 Me. 139. Contra: *First Nat. Bank v. Indiana Nat. Bank*, 30 N. W. 803; *Lisbon First Nat. Bank v. Wyndmore Bank*, 15 N. D. 299; *Canadian Bank of Commerce v. Bingham* (Wash. 1907), 91 Pac. 185; *Statute of Penna. of April 5, 1849*, P. L. 426, see *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 Pa. St. 46.

(32) *Zane on Banks & Banking*, pages 236, 273, 656, and cases cited; *Morse on Banks & Banking*, section 352, and cases cited; *Merchants Nat. Bank v. Nat. Eagle Bank*, 101 Mass. 281; *Nat. Bank of North America v. Bangs*, 106 Mass. 441. *Mfrs. Nat. Bank v. Thompson*, 129 Mass. 438; *Nat. Exchange Bank v. Nat. Bank of North America*, 132 Mass. 147; *Merchants Nat. Bank v. Nat. Bank of Commerce*, 139 Mass. 513.

(33) *Espy v. Cumberland Bank*, 18 Wall. (U. S.) 605; *Birmingham Nat. Bank v. Bradley*, ubi supra; *Redington v. Woods*, 45 Cal. 406; *United States Nat. Bank v. National Park Bank*, 129 N. Y. 647; *First Nat. Bank of Minneapolis v. First Nat. Bank of Holyoke*, 182 Mass. 130; *Pittsburg Second Nat. Bank v. Guarantee & C. Co.*, 206 Pa. St. 616; *Hastings First Nat. Bank v. Farmers & C. Bank*, 56 Neb. 149.

(34) *Espy v. Cumberland Bank*, 18 Wall. 605; *Nat. Bank of Commerce v. Mfrs. & C. Bank*, 122 N. Y. 367; *Rapp v. Nat. Security Bank*, 138 Pa. St. 426.

These two classes of cases are distinguished by the courts from the cases where the check has a forged signature by the rule that a drawee, although bound to know his drawer's signature, is not bound to know the payee's signature or the writing in the body of the check, and is entitled to rely on the indorsement of the prior bank to the check as a warranty of the genuineness of prior indorsements, and of the amount stated in the check. Perhaps a more scientific explanation of the distinction is, that where an indorsement has been forged, there is a new party in the situation, the true owner; he has a right of action against drawee and any person who deals with the check; and the drawee, after paying the true owner, may, by subrogation, go at the person who misused the check, however innocently. So where a check has been "raised," it saves circuity of action to permit the drawee an action to reimburse it for the excess it has erroneously paid.

Where the previous bank against whom a recovery is sought was but an agent for collection in behalf of the owner (or pretended owner) of the check, and that agency is known to the drawee bank, the latter bank, by the general principle of the law of agency,³⁵ cannot recover from the previous bank, when the money has been paid over by the agent to the principal before notice of the mistake.³⁶

An indorsement "for collection" is a notice of the relation of the parties dealing with the check,³⁷ but if the indorsement is general, evidence cannot be introduced to show that actually the original deposit was

for collection merely.³⁸ An indorsement "for deposit" is generally regarded as passing complete title to the depositary bank.³⁹

V.

The rules of law being as I have stated them, the effect of a notice from a bank to its depositor, accompanying his returned checks, remains to be considered. Much of course, depends upon the wording of the notice. If the notice merely requires the depositor to examine his checks within a stated time for the purpose of discovering over-payments and forged signatures, and the time is reasonable, the notice would seem to be a proper limitation of the time during which the depositor must exercise his legal rights, and there would seem to be no reason for not giving the notice full effect.

If, on the other hand, the notice is to be interpreted in a given case as requiring the depositor to take the risk of forged indorsements, or mispayments made through the negligence of the bank, the notice enlarges the depositor's legal liability. In such case, it is only effective if it enters into the contract between the depositor and his bank. In the absence of an expressed assent on the part of the depositor to the imposition of such a burden, it would hardly seem likely that the courts would so interpret the notice.

In only two cases does the point seem to be touched upon. In *Dodge v. National Exchange Bank*,⁴⁰ the court discusses the claim of the bank to hold a customer bound by a custom of the bank as to the mode of ascertaining the identity of the payee, and holds the bank liable for a mispayment on a forged instrument. In *Clark v. Nat. Shoe & Leather Bank*,⁴¹ the passbook had the statement that all errors or irregularities

(35) *LeFarge v. Kneeland*, 7 Cow. 456; *I. C. & R. I. Mamatt v. McLean*, 1 Wend. 173.

(36) *Onondaga Co. Sav. Bank v. U. S.*, 64 Fed. 705; *United States v. American Exchange Bank*, 70 Fed. 232; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.), 287; *Metropolitan Nat. Bank v. Lloyd*, 90 N. Y. 530; *National Park Bank v. Seaboard Bank*, 14 N. Y. 28; *Nat. C. Bank v. Westcott*, 118 N. Y. 468; *United States Nat. Bank v. Nat. Park Bank*, 59 Hun, 495, aff. 129 N. Y. 647.

(37) *Freeman's Bank v. Nat. Tube Works*, 151 Mass. 513; see cases cited in note 36 supra.

(38) *Prescott Bank v. Caverly*, 7 Gray, 217; *Brown v. Ames*, 59 Minn. 476; *Crosby v. Wright*, 70 Minn. 251. See *Selover on Bank Collections*, Section 53.

(39) *Ditch v. Western Nat. Bank*, 79 Md. 192; contra, *Beal v. Somerville*, 50 Fed. 647. See *First Nat. Bank v. Northwestern Nat. Bank* (Ill.), 29 N. E. 884.

(40) 20 Ohio St. 234, 30 Ohio St. 1.

(41) 32 App. D. (N. Y.) 316, aff. 164 N. Y. 498.

in vouchers must be reported in ten days, or they would be held to be conclusively adjusted. The returned checks contained a slip stating that reclamations for errors and objections to entries made or vouchers returned should be made with due diligence. In finding that a depositor was not negligent who failed to examine returned checks personally and discover that his confidential clerk had raised their amounts, and then altered the bank statement, the court said that forgeries could scarcely be called "errors or irregularities," and that in any case the statement in the passbook was modified by the statement on the slip.

VI.

CONCLUSIONS.

A. A bank cannot charge its depositor for a forged, or altered check, or a check paid on a forged payee indorsement, unless the depositor himself was negligent in the inception of the check, or has so acted as to ratify the payment; but the bank will have a defense for a mispayment, *pro tanto*, in so far as the depositor is negligent, after the mispayment, in discovering and reporting it.

B. If, as between the bank and its depositor, the bank must bear such a mispayment, the drawee bank cannot, by the weight of authority, obtain reimbursement from the bank which presented the check, when the mispayment was on a forged check, unless the prior bank were itself negligent or *mala fide*. It may, however, obtain reimbursement, when not itself negligent, in cases of forged indorsements of payees for the whole amount, and in cases of raised checks for the excess amount, when the original bank had complete title to the check as far as its transferrer could give it, or when it acted as an agent and has not paid over the proceeds at the time of the drawee's demand.

C. A notice by a drawee bank to its depositor, requiring him to notify the bank within a specified reasonable time of errors or mispayments, is probably proper in so far as it may be interpreted as marking out

the period of time during which he must avail himself of his legal rights; but is of doubtful force, if it is to be interpreted as throwing upon him the risks which the bank, by the general principles expressed under A, is bound by law to assume.

CLEMENT F. ROBINSON.

Portland, Maine.

SALES—REPUDIATION OF CONTRACT.

FAIRBANKS, MORSE & CO. v. HELTSLEY & CO.

Court of Appeals of Kentucky, November 17, 1909.

Where the buyer of an engine from a manufacturer notified the seller before the engine had been seen, tendered, or delivered that he would not accept it, and for this reason there was no delivery and the title at all times remained in the seller, he could not maintain an action for the price.

HOBSON, J.: Fairbanks, Morse & Co. brought this suit against S. W. Heltsley & Co. in the Todd circuit court. The defendants demurred to the petition; their demurrer was sustained. The plaintiff filed an amended petition. The defendants demurred to the petition as amended. The demurrer was sustained, and, the plaintiff failing to plead further, the petition was dismissed. The plaintiff appeals.

The facts stated in the petition are briefly these: The plaintiff is a corporation created by the laws of Illinois. On July 30, 1908, it entered into a written contract with the defendants by which it agreed to deliver on board the cars at Elkton, Ky., one 15-horse power gasoline engine, for which the defendants agreed to pay it \$600. The plaintiff immediately proceeded to build and equip an engine in compliance with the terms of the contract, and crated and prepared it for shipment from its factory to Elkton; but before it was shipped the defendants notified the plaintiff that they would not receive the engine if

shipped, or pay for it, and for this reason it did not ship the engine, although ready and willing to do so. No part of the contract price was paid, and on these facts the plaintiff asked judgment for the contract price, \$660, and costs.

In *Cook v. Brandeis*, 3 Metc. 555, the plaintiff sold certain wheat to the defendants to be thereafter delivered, but the defendants, when the time came for delivery, refused to receive it. The plaintiff thereupon sold the wheat for less than the contract price, and brought a suit to recover damages. In defining his rights the court said: "In such case—that is, where the vendee refuses to receive the thing bargained for—the vendor may consider it as his own, as if there had been no delivery, and recover the difference between the value at the time and place of delivery and the contract price; or he may sell it with due precaution and diligence to satisfy his lien for the price, and then he may sue and recover only the unpaid balance of the contract price, or he may consider it as the property of the vendee subject to his call or order, and then he recovers the full price which the vendee was to pay. In either case the election rests with the vendor; the vendee having violated his contract." In the subsequent case of *Bell v. Offutt*, 10 Bush. 632, Bell had sold certain hogs to Offutt to be thereafter delivered, and Offutt declined to take the hogs when tendered. Bell thereupon sold the hogs for less than the contract price, and brought suit for damages. The court there laid down the same rule as in *Cook v. Brandeis*. But it will be observed that in both of these cases the seller had sold the property in the open market for the best price attainable, and the court did not have before it the question what he must do to recover the contract price in order that the thing sold might be regarded as the property of the purchaser. This question was presented in *Webber v. Minor*, 6 Bush. 463, 99 Am. Dec. 688. In that case, the plaintiff had sold a lot of wood, which the defendant refused to receive, and brought an action for the price while he still had the wood. The court, holding that he could not recover the price, said: "According to the case of *Cook v. Brandeis* and *Crawford*, 3 Metc. 555, relied on for the appellee, and the authorities therein cited, the appellee might on the refusal of the appellant to receive and pay for the wood, if he was bound to do so by the contract, have either kept the wood and recovered by proper

action the difference between its value at the time and place of delivery and the contract price, or he might have sold it with due precaution and diligence, and then have sued for and recovered the difference between the price received and the contract price, or he might upon making an actual or constructive delivery of the wood have recovered the full contract price, the measure of relief sought in this action. But, although the evidence conduces to sustain the plaintiff's averments of the contract, and his readiness and offer to deliver the one hundred and fifty-four cords of wood, and the refusal of the defendant to receive it, these facts do not in our opinion constitute, actually or constructively, a complete performance of the contract; for, conceding that a substantial compliance with his undertaking did not require that he should place the wood upon the brickyard against the will of the defendant, he should have set it apart for the defendant, and relinquished his own control of it at or as near to the place of delivery as was reasonably practicable. This would have been a constructive delivery of the wood, not merely an offer or tender of delivery. *Duckham v. Smith*, 5 T. B. Mon. 372; 2 Story on Contracts, sec. 800. And, as there would have remained nothing more for the plaintiff to do to vest the property in the defendant and render the sale absolute, he might then have recovered the contract price of the wood. But he was not entitled to a recovery to that extent upon the allegation and proof only of a tender or offer of delivery, which, if true, neither divested him of the legal title nor the possession of the wood."

This case followed the rule which had been previously announced in *Williams, etc., v. Jones, etc.*, 1 Bush. 621, and it has been followed in *Wells v. Maley*, 6 Ky. Law Rep. 77; *Miller v. Burch* (Ky.), 41 S. W. 307; *Singer Manufacturing Co. v. Cheney* (Ky.), 51 S. W. 813; *Hauser v. Tate*, 105 Ky. 701, 49 S. W. 475, 20 Ky. Law Rep. 1716. A contrary rule was not laid down in *Jones v. Strode*, 41 S. W. 562, 19 Ky. Law Rep. 1117, or in *Hollerbach and May Contract Company v. Wilkins* (Ky.), 112 S. W. 1126. In each of these cases the action was brought to recover damages for the breach of the contract. In *Benjamin on Sales*, sec. 1117, the rule is thus stated: "When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract as has been explained in Book II, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer of

his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the buyer is for damages for nonacceptance. He can in general only recover the damage that he has sustained, not the full price of the goods. The law with the reason for it was thus stated by Tindal, C. J., in delivering the opinion of the Exchequer Chamber in *Barrow v. Arnaud*: 'Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them.'

Here there was a contract to make a gasoline engine, and to deliver it on board the cars at Elkton, Ky. Before the manufacturer had shipped the engine, and before it had been seen, tendered, or delivered to the purchaser, he notified the seller that he would not take it. The property in the engine had not passed. The engine remained at the manufacturer's factory. It was its property, and was subject to its control. The plaintiff had in no manner released its control of the engine. If the engine had been destroyed, it would have been at the plaintiff's loss, and any insurance upon it would have belonged to the plaintiff. That in such a state of case an action for the price cannot be maintained is sustained by the great weight of American authority. *Mechem on Sales of Personal Property*, secs. 1091, 1092; *Newmark on Sales*, sec. 391; 24 *Am. & Eng. Ency. of Law*, 1118; *Note to Gardner v. Deeds*, 7 *Am. & Eng. Ann. Cas.* 1175, 1176; *Oklahoma Vinegar Company v. Carter*, 116 *Ga.* 140, 42 *S. E.* 378, 59 *L. R. A.* 122, 94 *Am. St. Rep.* 112; *McCormick v. Balfany*, 78 *Minn.* 370, 61 *N. W.* 10, 79 *Am. St. Rep.* 393, and cases cited.

The plaintiff's petition states no facts to constitute a cause of action for damages for the breach of contract. It is simply an action for the price; no facts being stated upon which a judgment for damages could be rendered. The dismissal of this action will not bar another action for damages for the breach of the contract, as a judgment upon an insufficient petition is never a bar to another action.

Judgment affirmed.

NOTE.—*Remedy of Seller, Notified Before Shipment that Buyer Will Not Accept Delivery.*—In 68 *Cent. L. J.* 198, we considered, in annotation, the question of "Passing of title before payment of price," and in 69 *id.* 220, we referred to the rule governing the case of "property tendered upon condition that buyer pays cash." We cited in the latter discussion the following from *Ackerman v. Rubens*, 167 *N. Y.* 405: "When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him and sue for the entire purchase price; or he may keep the property as his own and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get and sue for the balance of the purchase money." That case would seem to be against the principal case, unless it is distinguishable in the fact, that there was no feature in it as to future delivery by the seller. The court's statement of facts show that "the plaintiff sold his yacht *Iola* to the defendant for \$2,250, by an executory contract which impliedly provided that the title should not pass until the purchase price should have been fully paid." Plaintiff's obligation to deliver had no future about it, nor did defendant's to receive, but either was in a position to demand instant compliance. And whatever was waived as to such compliance was personal to him doing so. But here the question concerns, as Mr. Bryan might say, the "twilight zone" between agreement to sell and the time of the completion of the contract, and the notification in that time. Has such a seller the three remedies indicated by the New York case, or only one or two of them? There is no such zone, according to New York decision, where the contract reasonably requires time for seller to make delivery, arising out of the nature of the article shown and the transportation to intervene, if delivery is begun and accepted as such and is being continued, unless seller chooses to accept notice as to the portion undelivered. *Zerwilliger v. Knapp*, 2 *E. D. Smith*, 86. In such case the three remedies would exist. And so all these remedies exist in the case of a sale of articles to be manufactured and then delivered, where there is no evidence of a refusal by buyer to complete sale until the agreement to manufacture has been fully performed. *Donnell v. Hearn*, 12 *Daly*, 230. See also *Ballentine v. Robinson*, 46 *Pa.* (10 *Wright*) 177, which is to same effect. But a later case in Pennsylvania rules in accord with the principal case and states the matter in a way which is not easily forgotten. Thus there was an accepted order for goods to be shipped on a certain day, said goods not being specific, but to be separated from a bulk and set apart to vendee. In the meantime the buyer notifies the seller not to ship. The court said: "It is plain that the notice given to the plaintiffs by the defendant was a repudiation of the contract; it was not a rescission, for it was not in the power of anyone to rescind; but it was a refusal to receive the goods, not only in advance of the delivery but before they were separated from and set apart to the defendant." *Unexcelled Fireworks Co. v. Polites*, 130 *Pa.* 536, 17 *Am. St. Rep.* 738. This case may differ from the principal case in that a particular engine was contracted for, but it does not certainly appear that it was not an engine to be taken from stock on hand. The principal case does not consider

any such question. In *Rounsaville & Bro. v. Leonard Mfg. Co.*, 127 Ga. 735, it was held that where goods are ordered, but not yet shipped, the contract can be repudiated, because the contract is still executory and seller's remedy is not to ship and sue for price, but the code remedy is one of three: (1) damages on breach, (2) sell as agent for purchaser and recover the difference, or retain or store for buyer and sue for price, but that is only because the code specifically so provides. As a matter of general law, however, the leaning of the court seems to be, that the first would be his only remedy.

In St. Louis Court of Appeals this executory contract idea is not recognized as to sale of specific articles to be manufactured after they have been manufactured and ready for delivery, and notice at or after then left the buyer his choice of the three remedies stated in the *Ackerman* case, *supra*. *St. Louis Range Co. v. Mercantile Co.*, 120 Mo. App. 438. The opinion in this case is by Judge Goode and he distinguishes between specific articles to be manufactured, where the contract to manufacture has been performed, and "a sale of goods generally like merchandise or corporate stocks currently dealt in, when it is contemplated that specific articles or stocks shall be subsequently selected and delivered pursuant to the contract." This is the principle of the *Fireworks* case, *supra*. See also cited by Judge Goode, *Bethel St. Co. v. Brown*, 57 Me. 9; *Shawhan v. Van Nest*, 25 Oh. St. 490; *Mitchell v. LeClaire*, 165 Mass. 365. The reason for this distinction is that in manufactured articles the assumption is that the buyer has "acquired title to the property and that it is held subject to his order, or else that it is worthless in the hands of the vendors so that the latter cannot reimburse themselves for their loss by using or disposing of it." But in the case in which this distinction was drawn it appeared that plaintiff had treated the specific articles as his own and while they had no market value, they were not like a suit of clothes or a portrait for a particular buyer, and recovery was allowed, but difference in contract price and value arrived at in another mode than as based on market value. While the point, therefore, which we have here was not actually involved in this case, the reasoning and citation of authority are pertinent.

In *Fountain City Drill Co. v. Peterson*, 126 Wis. 512, recovery for agreed price was sustained where delivery was made to carrier, because countermand of the order was not sufficiently unambiguous and specific. The court said: "For the purposes of this argument we may concede the right of a purchaser to repudiate the contract, and, by notification to the seller, to limit liability to the damages caused by the breach so committed," citing therefor late cases in Wisconsin Supreme Court, viz.: *Merrick v. Ins. Co.*, 124 Wis. 221; *Woodman v. Blue Grass L. Co.*, 125 id. 489. But it is said "the notice of repudiation must be so authoritative and unambiguous as to wholly and beyond doubt absolve the seller." In the *Woodman* case it was said: "The law with regard to an anticipatory breach of an executory contract doubtless is that the other party must treat it as a breach, and that if he does not do so, but continues to demand performance, he will be held to have kept the contract alive for the benefit of both parties. In other words, he cannot treat the repudiation both as a breach and as no breach at the same time."

All of which means that, if it is thus kept alive and the party who gave the antecedent notice wishes to repent of his notice, he may, but he does not have to stand as a purchaser, if he does not wish to.

These additional cases we have cited appear to show the principal case is supported in reason and authority. C.

JETSAM AND FLOTSAM.

MOTOR OMNIBUSES: A NUISANCE OR NOT?

This Journal lately contained an annotation on responsibility of owner of an automobile as a dangerous machine (69 Cent. L. J. 360), and we reproduce what follows, showing a somewhat like view in England:

The advent of the motor omnibus has naturally been followed by a number of actions brought against their owners by victims of street accidents. The majority of such cases are, of course, not worthy of report, turning as they do upon pure questions of fact, negligence on the part of the driver or not, contributory negligence on the part of the plaintiff or not. But there is a small group of decisions which have raised questions of law and have, therefore, found their way into the various reports, and which are deserving of some consideration. The latest of them in order of date is *Parker v. London General Omnibus Company, Limited* (1909), in which the Court of Appeal affirmed a decision of a divisional court, reported at (1909), 73 J. P. 283. The decision is of some importance because it deals with the doctrine of "nuisance" which had been more than once successfully invoked by plaintiffs in these running down cases, and which at one time looked likely to cause omnibus companies considerable trouble. There is, we apprehend, no doubt that a vehicle may be so uncontrollable and so likely to cause accidents, however skillfully managed, as to be a "nuisance" if worked upon a public highway. Whether its behavior is bad enough to bring it within the category of a nuisance is a question of fact for a jury; and, if they so find, the person responsible for running it may be indicted, and, moreover, anyone who suffers particular damage from it can maintain an action. In *Parker's* case a boy was knocked down by a motor omnibus, and brought an action, founding his claim on the driver's negligence. The jury found that the driver was not guilty of negligence, and were then asked (apparently as an afterthought) whether the omnibus was a nuisance. Upon this point they could not agree, and the courts above had to consider whether there was any evidence sufficient to support a finding of negligence, even if a jury returned one. The material facts were very simple. The plaintiff and another boy stepped off the pavement in front of an omnibus traveling at eight or nine miles an hour on a greasy road. The driver applied his brakes suddenly, cutting off his motive power and slewing round the fore part of the omnibus to avoid the boys. Not unnaturally, the back part swung round "skidding," and the side of the omnibus struck the plaintiff. In cross-examination the driver said: "If the road is in a bad state and you stop suddenly, it will skid. Eight to nine miles is a fair pace. The faster we go the more difficult it is to prevent skidding. You cannot prevent the skidding. They have not yet found any means of preventing it." Upon these facts the court had no difficulty in holding that there was

no evidence that the omnibus was a nuisance. It will be remembered that the jury negatived negligence or mismanagement; in other words, it must be taken that the driver was proceeding at a proper pace having regard to the habits of his omnibus and to the impediments which he could see or ought reasonably to be expecting. The act of the boys in stepping onto the road was something against which he could not guard, and the mere fact that his adoption of the proper remedies caused the omnibus to skid did not necessarily point to it being a nuisance. As Darling, J., pointed out: If a horse is pulled up suddenly to avoid one person, it may easily fall and injure someone else. The effect of the decision appears to be that companies have not much to fear from the doctrine of nuisance on the ground of skidding. Granted that an omnibus is prone to skid if pulled up too suddenly, a driver's duty is to keep so much clear space before him and to travel at such a pace as to be able to pull up safely and avoid a vehicle or person stopping or crossing in front in a reasonable manner. If he fails to do this he will be negligent; but, if once negligence is negatived, there will be little fear of a finding of nuisance, for the absence of negligence on the part of a driver acquainted with the peculiarities of his omnibus points almost conclusively to the fact that the plaintiff brought about an unexpected state of affairs rendering skidding no proof of such inherent vice as would amount to a nuisance. Another case in which the same question was discussed was *Wing v. London General Omnibus Company* (1909), 73 J. P. 429. Here, too, the Court of Appeal decided in favor of the company, reversing a divisional court (*ibid.* p. 170), but it may be noted that Buckley, L. J., who agreed with the decision in *Parker's* case, dissented in *Wing's* case. The plaintiff this time was a passenger in the erring vehicle, and was injured in consequence of its collision with a lamp standard, such collision being due to skidding brought about by avoiding other vehicles while traveling about five miles an hour. To a great extent the difficulties experienced by the lords justices appear to have arisen from the form of the county court judge's notes and the way in which the case was framed at the trial. It is, indeed, not easy to say exactly what the effect of the decision is, but we think that it may be fairly stated as follows: A plaintiff who seeks to recover on the ground of a nuisance must give definite and affirmative evidence of something more than the fact that all motor omnibuses are liable at times to skid, and that the particular omnibus did skid without any negligence on the part of the driver on this particular occasion.

Three other cases arose out of damage done by omnibuses to lamp-posts on the footway, such damage being due, not to the omnibus mounting the curb, but to its overhanging the pavement, such "overhang" being in part due and accentuated by the camber of the roadway. The latest decision is *Barnes Urban District Council v. London General Omnibus Company* (1909), 73 J. P. 68. In that case an omnibus in daylight knocked over a lamp-post standing on the pavement. No affirmative evidence of negligence (on which the plaintiffs based their claim) was given, and the defendants called no evidence negativing negligence. It was held that judgment ought to have been entered for the plaintiffs, and the following proposition was laid down: If a vehicle in daylight damages a fixed structure on the pavement, the fact of the

collision is *prima facie* evidence of negligence on the driver's part, and the defendants must displace it by showing that the driver was using reasonable care.

An almost similar case had arisen previously in *Isaac Walton and Company v. Vanguard Motor Bus Company* (1908), 72 J. P. 505, the only difference being that in that case the omnibus had skidded on to the lamp-post, whereas in the *Barnes* case there was, apparently, no skidding. In the *Vanguard* case the county court judge held that there was no evidence of negligence. The divisional court disagreed with him, but did not take the course which they subsequently did in the *Barnes* case. Instead of entering judgment for the plaintiffs they ordered a new trial on the question of negligence, and we presume that the distinction is that where without skidding an omnibus knocks down a lamp the mere collision is *prima facie* evidence of negligence; but when once skidding is proved it is no longer fair to presume that the driver was responsible unless he proves the contrary. As the curb and lamp are fixed objects, the fact that an omnibus skidded on to the latter seems to show that the driver approached too rapidly and pulled up too suddenly; but, of course, his conduct may have been rendered necessary by the unexpected behavior of a third party. The last of our cases, *Gibbons v. Vanguard Motor Bus Company* (1908), 72 J. P. 505, is one upon which too great reliance ought not, we think, to be placed. It appeared that a motor omnibus skidded into a lamp on a day when the roads were greasy. The county court judge found that the driver was guilty of no personal negligence, that it was a well-known fact that in certain conditions motor omnibuses were liable to skid, and that when they did so it was impossible to control them; and he held that in these circumstances the defendants were liable for placing a nuisance on, and for negligently using, the highway. He accordingly gave judgment for the plaintiff, and a divisional court refused to interfere.

Now, on the nuisance point the case seems to be at variance with the two Court of Appeal decisions referred to at the outset. On the other hand, so far as negligence is concerned, we doubt whether a jury would take the same view. If the courts are to hold that an omnibus is not a nuisance merely because it sometimes skids, it must, we think, be on the assumption that it will not skid if reasonably handled, and putting aside any extraordinary circumstances it seems to follow that if a driver allows it to skid on to a stationary object, he has either omitted to notice that object or has approached it at too great a speed.—The Justice of the Peace, London.

HUMOR OF THE LAW.

A buxom young woman of some twenty summers came into my office the other day, relates one of our correspondents, to see me in regard to securing for her a divorce. We talked over the case, and I advised her that we would probably have no difficulty in securing the decree on the ground of non-support, and that it was likely to be a default case.

She then asked me our fee and I told her it would cost her \$40.

"Well," she said, "mother has gotten three divorces and I have gotten two for \$25 each, and that is all I'm going to pay for this one." —Ohio Law Bulletin.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

California.....	11, 17, 29, 30, 31, 33, 34, 38, 47, 53, 54, 56, 59, 61, 67, 72, 75, 78, 87, 94, 107.
Colorado.....	7, 19, 35, 36, 43, 52, 63, 68, 95, 98, 108
Georgia.....	13, 14, 18, 23, 41, 44, 110, 116
Indiana.....	9, 10, 76, 83, 91, 100, 104, 112, 115, 124
Louisiana.....	86
Massachusetts.....	66, 73, 79, 82, 96, 109, 125
Montana.....	80, 105
New York.....	45, 55, 65, 90
North Carolina.....	1, 27, 60, 81, 92, 101, 117, 119
Oklahoma.....	6, 8, 12, 15, 20, 21, 37, 46, 64, 71, 93, 99
Oregon.....	5, 26, 97
South Carolina.....	51, 103, 106
U. S. C. C. App.....	4, 16, 22, 24, 25, 45, 57, 102, 111, 114.
Utah.....	85
Washington.....	28, 32, 39, 42, 49, 58, 62, 69, 74, 77, 84, 88, 89, 113, 118, 120, 121, 122, 123.
West Virginia.....	50
Wyoming.....	2, 3, 40, 70

1. **Action—Misjoinder.**—If three actions were proper, for relief sought in one, the court should have ordered the pending action divided into three, and not have given leave to bring two new actions, under penalty of dismissal of the pending action, under Revisal 1905, sec. 476.—*Ricks v. Wilson*, N. C., 65 S. E. 614.

2. **Adverse Possession—Tacking Successive Possessions.**—Possession for the statutory period need not be continued in the same person to constitute adverse possession; but where there is privity between persons successively in possession, holding adversely to the true title continuously, the successive periods of occupation may be united to make up the statutory time.—*Bryant v. Cadle*, Wyo., 104 Pac. 23.

3. **Uninclosed Private Lands.**—The use of uninclosed private lands to pasture live stock held merely permissive, creating no title and terminable at any time.—*Mcllquham v. Anthony Wilkinson Live Stock Co.*, Wyo., 104 Pac. 20.

4. **Aliens—Minor Son of Chinese Merchant.**—A minor Chinese person, the son of a United States Chinese merchant, having lawfully entered the country while a minor as a student, held entitled to remain after attaining his majority, though he has since worked as a laborer.—*United States v. Foo Duck*, U. S. C. C. of App., Ninth Circuit, 172 Fed. 856.

5. **Appeal and Error—Failure to Take Cross-Appeal.**—Where no cross-appeal is taken, appellee cannot be heard to question the sufficiency of the findings and decree of the court below.—*McCoy v. Crossfield*, Or., 104 Pac. 423.

6. **Finality of Order.**—Order vacating judgment and permitting defense held not a final order from which an appeal would lie.—*W. L. Moody & Co. v. Freeman & Williams*, Ok., 104 Pac. 30.

7. **Matters Considered on Rehearing.**—A proposition not advanced at the original hearing will not be considered on application for rehearing.—*Hireen v. R. W. English Lumber Co.*, Colo., 104 Pac. 84.

8. **Misjoinder of Causes.**—The question of misjoinder of causes of action, must be raised

in the trial court, or it will be treated in the Supreme Court as waived.—*Kansas City, M. & O. Ry. Co. v. Shutt*, Ok., 104 Pac. 51.

9. **Review.**—Every presumption is in favor of the action below, and if but a partial record is presented on appeal, and it can be sustained on any conceivable state of facts, which a complete record might have disclosed, the judgment will be affirmed.—*Faulkner v. Baltimore & O. S. W. R. Co.*, Ind., 89 N. E. 511.

10. **Right of Appeal.**—Where no statute expressly or impliedly authorizes an appeal in a proceeding, no right of appeal exists.—*Bear v. Reese*, Ind., 89 N. E. 522.

11. **Right to Appeal.**—An executrix held entitled to appeal from an order granting a family allowance to infant beneficiaries only in her representative and not in her individual capacity.—*In re Snowball's Estate*, Cal., 104 Pac. 446.

12. **Assignments—Actions for Tort.**—A cause of action for the wrongful destruction of personality by fire held not assignable.—*Kansas City M. & O. Ry. Co. v. Shutt*, Ok., 104 Pac. 51.

13. **Attachment—Damages.**—One whose property has been taken under process directed against another is entitled to actual damages.—*Speth v. Maxwell*, Ga., 65 S. E. 580.

14. **Bankruptcy—Pending Actions.**—A trustee in bankruptcy, intervening in a state court, held not to have the right to watch the suit for months and after a partial decree by consent, and then on the general pleadings have all that has been done considered a nullity so far as it hurts him, and leave the rest standing.—*Wikle v. Jones*, Ga., 65 S. E. 577.

15. **Banks and Banking—Title to Assets.**—Stockholder and director of bank, inadvertently mingling certain of his assets with those of the bank at the sale of his stock, held not estopped to set up title thereto.—*People's Nat. Bank v. Board of Com'rs of Kingfisher County*, Ok., 104 Pac. 55.

16. **Ultra Vires Acts.**—A purchase of national bank stock for speculation by a national bank is ultra vires.—*Metropolitan Trust Co. of New York v. McKinnon*, U. S. C. C. of App., Second Circuit, 172 Fed. 846.

17. **Bills and Notes—Burden of Proving Payment.**—Where a complaint on a note alleges that plaintiff is the "owner and holder," the burden is on defendant to prove payment.—*Aetna Indemnity Co. v. Altadena Mining & Investment Syndicate*, Cal., 104 Pac. 470.

18. **Conditions Precedent.**—Performance of a condition precedent to the taking effect of a note sued on may be waived or the person for whose benefit it was made may be estopped from complaining of its nonperformance.—*Heltman v. Commercial Bank of Savannah*, Ga., 65 S. E. 590.

19. **Consideration.**—A note, given a bank in settlement of defaulter's indebtedness to the bank, held supported by a consideration.—*Lomax v. Colorado Nat. Bank*, Colo., 104 Pac. 85.

20. **Carriers—Burden of Proving Exemption Under Special Contract.**—A carrier defending on the ground that the loss is one excepted by special contract held to have the burden of showing the making of the contract, and that the loss falls within it.—*Patterson v. Missouri, K. & T. Ry. Co.*, Ok., 104 Pac. 31.

21. **Carriage of Live Stock.**—Station agent held without power to waive contract requirement that a suit for injury to live stock shipped be brought within ninety days.—*Missouri, K. & T. Ry. Co. v. Davis*, Ok., 104 Pac. 34.

22.—**Contracts Limiting Liability.**—Const. Neb., art 11, sec. 4, providing that "the liability of railroad corporations as common carriers shall never be limited," applies to contracts involving interstate commerce, and renders void a provision of a contract made in that state for the carriage of live stock into another state limiting the liability of the carrier in case of loss to an arbitrary valuation per head, regardless of actual value.—*Latta v. Chicago, St. P., M. & O. Ry. Co., U. S. C. C. of App., Eighth Circuit, 172 Fed. 850.*

23.—**Discrimination.**—A carrier, as to intrastate shipments, may by contract or custom bind itself to accept shipments beyond its line and such accommodation must be extended to all customers, under penalty of unjust discrimination.—*Georgia Coast & P. R. Co. v. Durrensee & Sands, Ga., 65 S. E. 583.*

24.—**Interstate Commerce.**—Fellow Servants.—Laws Neb. 1907, p. 191, c. 48, sec. 1, making railroad companies liable for injuries to employees from negligence of fellow servants, applies to companies doing an interstate business, and, in the absence of valid legislation by Congress on the subject, governs their liability to employees operating interstate trains.—*Missouri Pac. Ry. Co. v. Castle, U. S. C. C. of App., Eighth Circuit, 172 Fed. 841.*

25.—**Constitutional Law.**—Impairment of Contract.—The construction and maintenance by a telephone company of its lines in the streets of a city under authority conferred by a state statute is an acceptance by it of the provisions of such statute, and creates a contract between it and the state, which is protected from impairment by the federal Constitution.—*Sunset Telephone & Telegraph Co. v. City of Pomona, U. S. C. C. of App., Ninth Circuit, 172 Fed. 829.*

26.—**Initiative Amendment.**—Any part of the Constitution previously in force, inconsistent with the initiative amendment, held by its adoption necessarily repealed.—*State v. Langworthy, Or., 104 Pac. 424.*

27.—**Municipal Ordinances.**—One charged with violating a city ordinance prohibiting the sale of fresh fish outside of the market house held not entitled to raise the point that the contract between city and individuals for the erection by the latter of a market house was void.—*State v. Perry, N. C., 65 S. E. 915.*

28.—**Contracts.**—Moral Obligations.—Though the statute provides that any agreement authorizing a broker to sell real estate for a commission shall be void unless the agreement be in writing, where a broker sells land under an oral agreement authorizing the service, the moral obligation of the owner to pay for the services is sufficient to sustain a subsequent written agreement to pay therefor.—*Muir v. Kane, Wash., 104 Pac. 153.*

29.—**Mutuality.**—To be obligatory on either party, a contract must be mutual and reciprocal in its obligations.—*Harper v. Goldschmidt, Cal., 104 Pac. 451.*

30.—**Validity.**—If a contract can be performed in any legal method, it must be assumed that such method was contemplated by the parties and will be pursued.—*Burne v. Lee, Cal., 104 Pac. 438.*

31.—**Corporations.**—Assignment of Claims.—Execution of assignments of claims for a corporation by their respective managers held prima facie evidence of the managers' authority.—*Preston v. Central California Water & Irrigation Co., Cal., 104 Pac. 462.*

32.—**Capacity to Sue.**—A corporation organized to operate a machine shop held to have capacity to sue for work performed in its capacity of a machinist.—*Pacific Iron & Steel Works v. Goerig, Wash., 104 Pac. 151.*

33.—**Leases.**—The execution of a lease and its assignment by the proper officers of a corporation under the corporate seal was prima facie evidence that such instruments were executed under proper authority.—*J. S. Potts Drug Co. v. Benedict, Cal., 104 Pac. 432.*

34.—**Note and Mortgage.**—Where a corporation's note and mortgage was payable generally, it was not material that the authorizing resolution provided for payment out of a specified fund.—*Aetna Indemnity Co. v. Altadena Mining & Investment Syndicate, Cal., 104 Pac. 470.*

35.—**Transfer of Certificate.**—A wife, giving her husband her certificate of stock to be canceled by the company, and to pledge for a certain purpose shares to be thereupon issued in his name, held not entitled, on the husband's pledging the stock for another purpose, to recover the same from the pledgee.—*Lomax v. Colorado Nat. Bank, Colo., 104 Pac. 85.*

36.—**Criminal Law.**—Intoxicating Liquors.—One presenting himself as a buyer of intoxicating liquors from one knowingly unauthorized to sell is particeps criminis under Mills' Ann. St., sec. 1168.—*Walt v. People, Colo., 104 Pac. 89.*

37.—**Criminal Trial.**—When Jeopardy Begins.—Jeopardy does not begin until the jury has been selected and sworn.—*Caples v. State, Ok., 104 Pac. 493.*

38.—**Dismissal and Nonsuit.**—Want of Prosecution.—Nisi prius courts have inherent power to dismiss pending actions when not diligently prosecuted.—*Gray v. Times-Mirror Co., Cal., 106 Pac. 481.*

39.—**Divorce.**—Fraud.—Upon suggestion that a decree of divorce was a fraud upon the court, it should promptly make such inquiry and finding as will protect the integrity of its decrees, without reference to the relative rights and duties of the parties.—*Pringle v. Pringle, Wash., 104 Pac. 135.*

40.—**Easements.**—Way of Necessity.—The fact that a person had more cattle than could be supported on his own lands and for many years had used the public range held not to entitle him to ways of necessity over surrounding lands any more than any other cattle owner, whether owning real estate or not.—*McIlquham v. Anthony Wilkinson Live Stock Co., Wyo., 104 Pac. 20.*

41.—**Embezzlement.**—Intent.—Held none the less embezzlement because an agent knowingly using money of his principal in violation of his duty intended to restore it.—*Orr v. State, Ga., 65 S. E. 582.*

42.—**Eminent Domain.**—Conveyance of Land Acquired by Condemnation.—A railroad company cannot convey land, acquired by condemnation for railroad purposes, to a city for a different purpose.—*State v. Superior Court of Spokane County, Wash., 104 Pac. 148.*

43.—**Mandamus.**—Where a company was awarded the right to possession of property by a judgment in an eminent domain proceeding, and paid the damages and costs, it was entitled to orders necessary for its enforcement.—*People v. District of Jefferson County, Colo., 106 Pac. 484.*

44.—**Escrows.**—Common Law Rule.—The common-law rule that there can be no delivery in

escrow of a deed to the grantee is in force in Georgia.—*Heltman v. Commercial Bank of Savannah, Ga.*, 65 S. E. 590.

45. **Estoppel**—Pledge of Stock.—Where a pledgee of stock did not change its position by the owner's repudiation of the pledge, the owner was not estopped to subsequently tender the amount due and recover the stock.—*Metropolitan Trust Co. of New York v. McKinnon*, U. S. C. C. of App., Second Circuit, 172 Fed. 846.

46. **Evidence**—Book Entries.—Book entries in the ordinary course of business held admissible where sworn to be correct by the person who made them, otherwise not.—*Missouri, K. & T. Ry. Co. v. Davis, Ok.*, 104 Pac. 34.

47.—**Intent**.—A witness may be examined as to his intent in doing an act where the intent is a material element in the action.—*Fleet v. Tichenor, Cal.*, 104 Pac. 458.

48.—**Judicial Notice**.—The court will take judicial notice of claims and parties, which were before it on a previous occasion.—*In re Ordway N. Y.*, 89 N. E. 474.

49.—**Judicial Notice**.—Judicial notice cannot be taken of the records of other causes.—*Pacific Iron & Steel Works v. Goerig, Wash.*, 104 Pac. 151.

50.—**Judicial Notice**.—Judicial notice will not be taken of a judgment in another suit as res judicata, whether in the same or another court, when not pleaded or given in evidence.—*Pickens v. Coal River Boom & Timber Co., W. Va.*, 65 S. E. 865.

51.—**Loss of Baggage**.—A printed book containing a carrier's rules and regulations governing the storage of baggage is the best evidence thereof.—*McCoy v. Atlantic Coast Line R. Co., S. C.*, 65 S. E. 939.

52.—**Judicial Notice**.—The court will take judicial notice of the record of the state constitutional convention.—*Schwartz v. People, Colo.*, 104 Pac. 92.

53. **Execution**—Bona Fide Purchaser. — A purchaser of a judgment sale with actual knowledge that the judgment debtor had sold his interest in land to a third party, and of the possession of the latter, acquired no title.—*Zenda Min. & Mill. Co. v. Tiffin, Cal.*, 104 Pac. 10.

54. **Executors and Administrators**—Compound Interest.—An administrator may be charged with compound interest on money of the estate converted to his own use.—*In re McPhee's Estate, Cal.*, 104 Pac. 455.

55.—**Duty to Employ Counsel**.—Where an administratrix is sued in her representative capacity, it is her duty to employ counsel to ascertain the nature of the suit and advise her what course to pursue.—*In re Ordway, N. Y.*, 89 N. E. 474.

56.—**Improvident Appeals**.—Where an executrix improperly appealed from a proper family allowance order, damages would be awarded against her personally.—*In re Snowball's Estate, Cal.*, 104 Pac. 446.

57. **Federal Courts**—Jurisdiction.—A court of equity of the United States, having jurisdiction of the parties, may enjoin a continuing injury to real property within its jurisdiction by flooding caused by the improper construction of works maintained by defendant for diverting the water of a river into a canal, although such works are across the boundary within the Republic of Mexico.—*The Salton Sea Cases, U. S. C. C. of App., Ninth Circuit*, 172 Fed. 792.

58. **Fire Insurance**—Authority of Agent.—Where one assuming to act as an insurance agent receives an application, and the company with knowledge of such assumption issues a policy, and receives the premium, the act of the agent is the act of the company.—*Staats v. Pioneer Ins. Ass'n, Wash.*, 104 Pac. 185.

59. **Frauds, Statute of**—Pleading.—Where it appears on the face of the complaint that the agreement sued on is within the statute of frauds, the appropriate mode of taking advantage of the defect is by demurrer.—*Harper v. Goldschmidt, Cal.*, 104 Pac. 451.

60.—**Title of Property**.—An inquiry as to the title of insured in the property covered by a fire policy should be made at the time of the issuance of the policy, and not deferred until after a loss has occurred.—*Modlin v. Atlantic Fire Ins. Co., N. C.*, 65 S. E. 605.

61. **Frauds**—Contracts.—One induced by fraud to enter into a contract may either rescind by restoring what he has received thereunder, or affirm and sue for damages.—*Burne v. Lee, Cal.*, 104 Pac. 438.

62. **Garnishment**—Persons Entitled to Service.—Where judgment was entered for the garnishee, the debtor was not a necessary party upon plaintiff's appeal from the judgment, so that notice of appeal need be served only upon the garnishee.—*Iverson v. Bradrick, Wash.*, 104 Pac. 130.

63. **Guardian and Ward**—Assets.—A loan by a guardian of her ward's money not in compliance with Mills' Ann. St. secs. 2081, 2088, is at the guardian's peril.—*American Bonding Co. of Baltimore v. People, Colo.*, 104 Pac. 81.

64. **Indictment and Information**—Sufficiency.—The omission of "the" before the words "State of Oklahoma" in the caption of an information is not fatal.—*Caples v. State, Ok.*, 104 Pac. 493.

65. **Infants**—Right to Society of Infant Husband.—A wife has the right to the society of her infant husband, though in derogation of the original parental right of custody.—*Cochran v. Cochran, N. Y.*, 89 N. E. 470.

66. **Injunction**—Irreparable Injury.—A publisher, professing to give the public a full list of reputable express companies doing business in a city, held guilty of irreparable injury to the property of an express company omitted from the list authorizing it to sue for equitable relief.—*Davis v. New England Ry. Pub. Co., Mass.*, 89 N. E. 565.

67.—**Object of Writ**.—The office of a writ of injunction is to restrain the wrongdoer, not to punish him after the wrong has been done or to compel him to undo it.—*Dingley v. Buckner, Cal.*, 104 Pac. 478.

68. **Intoxicating Liquor**—Police Power.—Whatever right there may have been at common law to deal in intoxicating liquors, it was and is a right which may be regulated, or entirely suppressed, through the police power of the state.—*Schwartz v. People, Colo.*, 104 Pac. 92.

69. **Judgment**—Collateral Attack.—The recital in a judgment of facts sufficient to give the court jurisdiction to pronounce judgment establishes the presumption of jurisdiction.—*Holly v. Munro, Wash.*, 104 Pac. 508.

70.—**Construction**.—In construing a judgment, decree, or order having a like effect and affecting real estate, the court is not necessarily governed by the strict or technical rules applicable in the case of a deed of similar conveyance.—*Bryant v. Cadle, Wyo.*, 104 Pac. 23.

71.—Jurisdiction.—Jurisdiction cannot be conferred by agreement of the parties on a district judge at chambers to set aside a judgment theretofore rendered.—*W. L. Moody & Co. v. Freeman & Williams, Ok.*, 104 Pac. 39.

72.—Lien.—The lien of a judgment does not attach to the mere legal title to the land in the defendant at its rendition to the exclusion of a prior equitable title in a third person.—*Zenda Min. & Mill. Co. v. Tiffin, Cal.*, 104 Pac. 10.

73.—Trespass.—The projection of the foundation of a building erected by defendant on plaintiff's adjoining premises was a continuing trespass, for which successive actions would lie. *Curtis Mfg. Co. v. Spencer Wire Co., Mass.*, 89 N. E. 534.

74.—Vacating.—Fraud and error are not synonymous, so that a judgment could not be vacated for fraud because an appeal therefrom was dismissed by appellant's attorney through mere mistake of judgment.—*Melsenheimer v. Melsenheimer, Wash.*, 104 Pac. 159.

75.—Landlord and Tenant.—Assignment of Lease.—The assignment of a lease, which provides that it shall not be assigned without the lessor's consent, is not void; such unauthorized assignment being merely a breach of covenant, giving the lessor the right to forfeit the lease.—*J. S. Potts Drug Co. v. Benedict, Cal.*, 104 Pac. 432.

76.—Non-payment of Rent.—A landlord held to have no right to refuse a tender of the rent, and at the same time sue to recover possession for the non-payment of the rent.—*Remm v. Landon, Ind.*, 89 N. E. 523.

77.—Libel and Slander.—Privileged Communications.—Charges, though relating to the act of a public officer in the discharge of his official duties, cannot, if false, be privileged, though made in good faith.—*Quinn v. Review Pub. Co., Wash.*, 104 Pac. 181.

78.—Want of Malice.—In slander for charging that plaintiff entered defendant's house and stole jewelry, a question whether defendant was moved in anything she said by a desire to injure plaintiff was admissible to show absence of actual malice.—*Fleet v. Tichenor*, 104 Pac. 458.

79.—Life Insurance.—Burden of Proof.—In an action on a policy, the burden was on plaintiff to show, not only that the policy was delivered, but that the first premium was paid, while insured was in good health.—*Lee v. Prudential Life Ins. Co., Mass.*, 89 N. E. 529.

80.—Limitation of Actions.—Laches.—A defendant in an equity suit need not plead the statute of limitations in order to avail himself of the complainant's laches.—*American Mining Co. v. Basin & Bay State Mining Co., Mont.*, 104 Pac. 525.

81.—Lost Instruments.—Establishment.—If a deed or will is destroyed or suppressed, equity can give relief.—*Ricks v. Wilson, N. C.*, 65 S. E. 614.

82.—Master and Servant.—Delegation of Duty.—A foreman, in setting a servant to work and furnishing a saw for his use, represents the master.—*L'Hote v. S. B. Dibble Lumber Co., Mass.*, 89 N. E. 532.

83.—Master's Duty.—The factory act (*Burns' Ann. St.* 1908, sec. 8029), requiring all planers and other machinery to be guarded, was intended to protect workmen around dangerous machinery, and not to impose onerous and unnecessary burdens upon the factory owner, and should

be construed so as to carry out its purposes.—*Pinnell v. Cutsinger, Ind.*, 89 N. E. 493.

84.—Mechanics' Liens.—Personal Judgment.—Personal judgment may be rendered in a mechanic's lien case, the pleadings and evidence justifying it, though the lien be not established.—*Pacific Iron & Steel Works v. Goerig, Wash.*, 104 Pac. 151.

85.—Mortgages.—Action to Foreclose.—In an action to foreclose a prior mortgage, a subsequent mortgagee or claimant is a necessary party.—*Boucowski v. Jacobson, Utah*, 104 Pac. 117.

86.—Municipal Corporations.—Negligence of Pedestrians.—The act of a pedestrian in running in front of an automobile as a result of terror held not negligence.—*Navailles v. Dielmann, La.*, 50 So. 449.

87.—Non-Delegable Powers.—The charter provision vesting in the mayor and common council the power to appoint a board of plumbing examiners held non-delegable.—*Ex parte Grey, Cal.*, 104 Pac. 476.

88.—Restraining Vacation of Street.—The owner of a city lot abutting on a street narrowed and partially vacated by a proposed replat held entitled to sue to enjoin such vacation.—*Brazell v. City of Seattle, Wash.*, 104 Pac. 155.

89.—Sidewalk Construction.—A city council, having ordered a new sidewalk and fixed its character, could delegate to a committee the duty of making the contract.—*Woldenberg v. Sampson, Wash.*, 104 Pac. 184.

90.—Title to Streets.—Title to the streets in the borough of Manhattan held to be in the city in trust for public purposes.—*City of New York v. Bryan, N. Y.*, 89 N. E. 467.

91.—Negligence.—Contributory Negligence.—Contributory negligence is no excuse for willful injury.—*Freitag v. Chicago Junction Ry. Co., Ind.*, 89 N. E. 501.

92.—Where, in an action for injuries through negligence, two grounds of negligence are alleged, proof of either will support a verdict for plaintiff.—*Noble v. John L. Roper Lumber Co., N. C.*, 65 S. E. 622.

93.—When a Question for Court.—It is only where the facts are such that all reasonable men must draw the same conclusion that negligence or contributory negligence is for the court.—*Patterson v. Missouri, K. & T. Ry. Co., Ok.*, 104 Pac. 31.

94.—Parent and Child.—Abandonment.—Temporary absence, unaccompanied by an intent on the part of a mother to permanently separate from her children, held insufficient to establish abandonment.—*In re Snowball's Estate, Cal.*, 104 Pac. 444.

95.—Parties.—Necessary Parties.—One without whom the judgment will not protect defendant from another suit on the same cause of action held a necessary party, whose absence from the suit is ground for objection.—*Hall v. Allen, Colo.*, 104 Pac. 489.

96.—Partnership.—Employing Broker to Sell Business.—Where partners had all decided to sell their business, it was within the authority of one of them to employ a broker to make the sale.—*Willard v. Wright, Mass.*, 89 N. E. 559.

97.—Personal Liability.—Where a partner, in violation of an express agreement not to extend credit to relatives, advances money from the partnership funds or sells partnership goods to an impecunious relative, he is personally

liable for the account.—*McCoy v. Crosfield, Oreg.*, 104 Pac. 423.

98. **Physicians and Surgeons**.—Action for Medical Services.—A physician, in partnership with a non-licensed person in the management of a hospital, held authorized to sue, without joining such person, for professional services rendered patient in the hospital.—*Hall v. Allen, Colo.*, 104 Pac. 489.

99. **Pleading**.—Variance.—A variance is not material unless it has actually misled the adverse party.—*Patterson v. Missouri, K. & T. Ry. Co., Ok.*, 104 Pac. 31.

100. **Powers**.—Right to Convey Fee.—Power to convey a fee may be given to the holder of a life estate.—*Foudray v. Foudray, Ind.*, 89 N. E. 499.

101. **Railroads**.—Contributory Negligence.—Where a traveler sees and hears an engine drawing flat cars approaching a crossing, and attempts to cross in front of it, he is negligent, and cannot recover.—*Champion v. Seaboard Air Line Ry., N. C.*, 65 S. E. 917.

102. **Defective Construction of Crossing**.—A railroad company held liable to a landowner for an injury resulting from the negligent construction of a private crossing, which it had contracted to build and maintain for plaintiff's use.—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Stevenson, U. S. C. C. of App., Eighth Circuit*, 172 Fed. 866.

103. **Duty Toward Passengers**.—The rule that a carrier must use the highest care to protect passengers against insults from other passengers only applies when the carrier has knowledge of the danger.—*Norris v. Southern Ry. Carolina Division, S. C.*, 65 S. E. 956.

104. **Duty Toward Trespassers**.—A railroad company's duty to a trespasser is limited to refraining from inflicting injury upon him willfully, wantonly, or recklessly.—*Freitag v. Chicago Junction Ry. Co., Ind.*, 89 N. E. 501.

105. **Reformation of Instruments**.—Mutual Mistake.—Plaintiff, in order to reform certain deeds for mistake, must show a mutual mistake as to a material fact which did not occur by or result from complainant's negligence.—*American Mining Co. v. Basin & Bay State Mining Co., Mont.*, 104 Pac. 525.

106. **Release**.—Vacation.—A servant's administrator held not entitled to recover for the servant's wrongful death without tendering a return of all amounts received under a release executed by the servant before death.—*Treadway v. Union-Buffalo Mills Co., S. C.*, 65 S. E. 934.

107. **Sales**.—Time When Title Passes.—In absence of agreement to the contrary, after title passes the property is at the risk of the buyer, though possession has not been delivered; but, where there is a mere agreement to sell, loss of the property falls upon the seller.—*J. S. Potts Drug Co. v. Benedict, Cal.*, 104 Pac. 432.

108. **States**.—Delegation of Power Not Possessed.—As the legislature cannot do indirectly what it cannot do directly, if the constitution has prohibited it from enacting a prohibitory law, it cannot delegate to the people the power to declare prohibition by popular vote.—*Schwartz v. People, Colo.*, 104 Pac. 92.

109. **Street Railroads**.—Duty Toward Trespassers.—A newsboy, jumping on a street car to sell papers, held a trespasser, to whom the servants in charge owe no other duty than to refrain from willfully exposing him to injury.—*Lebox v. Consolidated Ry. Co., Mass.*, 89 N. E. 546.

110. **Making Change**.—A street railway, whose rules prescribe \$2 as the maximum amount that will be changed, held not required to furnish change for \$5 to collect three fares, and no other tender being made, may require such persons to leave the car.—*Burge v. Georgia Ry. & Electric Co., Ga.*, 65 S. E. 879.

111. **Treaties**.—Effect of Ratification.—The effect of the ratification by the United States of the International Convention for the Protection of Industrial Property, concluded at Brussels December 14, 1900, was, by article 4 bis thereof, the complete doing away with the interde-

pendence of foreign and domestic patents and of the limitation imposed on the term of domestic patents for inventions previously patented in foreign countries by Rev. St., sec. 4887, prior to its amendment in 1897 (U. S. Comp. St. 1901, p. 3382).—*Hennebique Const. Co. v. Myers, U. S. C. C. of App., Third Circuit*, 172 Fed. 869.

112. **Trial**.—Impeachment of One's Own Witness.—While a party may impeach his own witness by contradictory statements made out of court, he must do so before closing his case.—*Gray v. Good, Ind.*, 89 N. E. 498.

113. **Instructions**.—Though instructions were not based on issues made by the pleadings, it is sufficient if they were based on evidence admitted without objection as if upon sufficient pleadings.—*Johnson v. Caughren, Wash.*, 104 Pac. 170.

114. **Reception of Evidence**.—Under the rule of the federal courts an offer to prove certain facts may be made without first propounding a question to a witness as a basis for such offer, and, if the offer is rejected, error may be assigned thereon where there is nothing to indicate that the offer was not made in good faith, or that the proof would not have been produced if permitted.—*Missouri Pac. Ry. Co. v. Castle, U. S. C. C. of App., Eighth Circuit*, 172 Fed. 841.

115. **Taking Pleadings to Jury Room**.—The trial court may permit the jury to take with them the pleadings in a cause when they retire for deliberation.—*Muncie & P. Traction Co. v. Hall, Ind.*, 89 N. E. 484.

116. **Trusts**.—Absolute Gifts.—An absolute gift will not be cut down by implication to a trust merely because donor believed that donee would permit him to participate in the beneficial interest.—*Vickers v. Vickers, Ga.*, 65 S. E. 885.

117. **Equity Jurisdiction**.—Equity will assume jurisdiction to decree a trust where there is a gift to an executor under such circumstances that it ought to be a trust for the testator's relations.—*Sumner v. Staton, N. C.*, 65 S. E. 902.

118. **Gifts**.—Where the consideration is paid from the separate funds of one spouse and the property conveyed to the other, the presumption of gift, and not of resulting trust arising therefrom, can only be overthrown by convincing evidence.—*Denny v. Schwabacher, Wash.*, 104 Pac. 137.

119. **Vendor and Purchaser**.—Duty to Return Earnest Money.—The law implies a promise to repay earnest money, where an executory contract to convey land is rescinded by mutual agreement.—*Lewis v. Gay, N. C.*, 65 S. E. 907.

120. **Merchantable Title**.—Where it is necessary to show by parol how a grantor in the chain of title acquired title, held there is not a merchantable title which a purchaser is required to take.—*Watson v. Boyle, Wash.*, 104 Pac. 147.

121. **Waters and Water Courses**.—Adverse Possession.—To constitute adverse possession of the right to use a ditch across land of another and the water therein, given by mere license, the licensee must have repudiated the license, and brought knowledge of the repudiation home to the licensors.—*Weidensteiner v. Mally, Wash.*, 104 Pac. 143.

122. **Irrigation Ditch**.—Grantor of a right of way for an irrigation ditch held entitled to make any proper use thereof he desired which would not materially impair or unreasonably interfere with its use by the grantee.—*Hayward v. Mason, Wash.*, 104 Pac. 139.

123. **Water Rates**.—Water rates are not taxes, but only the price paid for water as a commodity.—*Twitcheil v. City of Spokane, Wash.*, 104 Pac. 150.

124. **Wills**.—Construction.—While too great weight may not be given to the inapt use of technical terms, the apt use of such terms always tends to support the conventional meaning.—*Foudray v. Foudray, Ind.*, 89 N. E. 499.

125. **Witnesses**.—Credibility.—While the maxim "falsus in uno, falsus in omnibus" is not adopted as a rule of law, the jury may entirely disregard the testimony of any witness considered willfully false in any particular, and the court could so instruct.—*Ducharme v. Holyoke St. Ry. Co., Mass.*, 89 N. E. 561.

INDEX-DIGEST

TO THE EDITORIALS, NOTES OF RECENT DECISIONS, LEADING ARTICLES, ANNOTATED CASES, LEGAL NEWS, CORRESPONDENCE AND BOOK REVIEWS IN VOL. 69.

A separate subject-index for the "Digest of Current Opinions" will be found on page 481 following this Index-Digest.

ABSTRACTS.

duties and liabilities of abstractors of title, 376, 378.

ACCIDENT INSURANCE.

construction of clause providing against injury "if caused by the burning of a building while said person is therein," 447.

ACTIONS.

does the statutory action for death abate by the subsequent death of the beneficiary, 199.

ALIMONY.

See DIVORCE.

APPEAL AND ERROR.

the movement for the lessening of reversals in appellate courts, 405.
ending litigation by narrowing the issues and granting partial new trial, 425.
meaning of the term "person aggrieved," 461.

ATTORNEY AND CLIENT.

barratrous contracts distinguished from champerty, 117.
practice of law by corporations, 172.
disbarment of attorney for contract providing for division of fees between layman and lawyer, 201.
compensation of attorneys, 202.
the new suggestion of judicial supervision of contingent fees, 355, 434.

AUTOMOBILES.

damages caused by skidding of motor vehicles, 210.
responsibility of owner of automobile as a dangerous machine upon the public highway, 359, 360.
is a motor public vehicle a nuisance, 470.

BANKRUPTCY.

rent to accrue not a provable debt, 29, 31.
severance of relation of landlord and tenant, 29, 31.
adjudication in bankruptcy as affecting the lien of a sub-contractor, 99, 100, 174.

BANKS AND BANKING.

insolvent bank receiving deposits, 92.
delivery of bank funds by a teller to one not presenting check therefor, 333.
authority of agent of a bank over money in his custody belonging apparently to another, 341, 343.
negligence of a bank as proximate cause of defalcation of teller in a suit against a third person, 345.
constructive bad faith in receiving moneys from a bank teller not in the ordinary course of business, 346.
liability of banks to their depositors for mispayments of checks and right of reimbursement for mispayment as between banks, 462.

BENEFIT SOCIETIES.

forbidden designation of beneficiary and liability of fraternal association on policy or reverter to association, 396, 397.

BILLS AND NOTES.

fraudulent holder passing title to bona fide purchasers, 297.
demand necessary to make default on interest mature the principal, 316.

BONA FIDES.

constructive bad faith in receiving moneys from a bank teller not in the ordinary course of business, 346.

BOOKS RECEIVED.

13, 121, 139, 211, 252, 417, 435.

BUILDING CONTRACTS.

effect of release of surety, 92.

CARRIERS.

See EMPLOYER'S LIABILITY ACT.

See SAFETY APPLIANCE ACTS.

is a railway ticket in its ordinary form exclusive evidence between the traveler and the conductor, of the traveler's right to be carried, 21.

fellow servant doctrine—waiver by employee of express company enuring to railroad company, 57.

strikes as an excuse for not receiving freight, 57.

charges on reconsignment, 147.

special damages for delay in shipments based on the character of the articles shipped, 306, 308.

passenger on freight train injured by jolts and jerks, 354.

CHattel MORTGAGES.

feeding mortgage by subsequent acquisition of property where "bargain" and "sell" are used in granting clause, 268, 269.

CIVIL RIGHTS.

right of action for violation of right of privacy, 92.

a New York court draws the color line, 118.

CONSTITUTIONAL LAW.

See EXTRADITION.

See POLICE POWER.

the fallacies of railroad rate regulation, 3.
the justification for the distinction of wage earners as a class, 12.

federal jurisdiction in suits arising under the constitution or laws of the United States, 19.

when are state enactments deemed to be confiscatory, 39.

rate regulation and interference by federal courts therewith, 55.

the deadly "the" of the Missouri constitution, 65.

constitutionality of the appropriation for the traveling expenses of the President, 145.

constitutionality of the initiative and referendum, 148.

right of state to incarcerate persons alleged to be insane, without a jury, 163.

constitutionality of the Bertillon system, 164.

the constitutionality of statute requiring master to give written reason for discharge, 219.

constitutional requirements as to form in writs and processes, 407.

the legal effect of the maximum provision of the Aldrich-Payne tariff law, 414.

the time the constitution of a new state goes into effect, 441.

CONTEMPT.

lynching an appellant pending his appeal as contempt of court, 129.

CONTRACTS.

See ILLEGALITY.

right to recover money advanced to carry out an illegal contract, 279.

illegal consideration in sale of immoral literature, 364.

COPYRIGHT.

the many changes instituted by the new copyright law, 119.

CORPORATIONS.

practice of law by corporations, 172.

dummy corporation organized to defeat escheat, 261.

a corporation promoter's liability and relation to subscribers for stock, 369.

CORPORATIONS (Continued).

corporation taking its own stock from debtor in payment of debt, 389.
 validity of agreement to control voting power of corporate stock, 390.
 assumption of indebtedness by purchasing corporation and liability of directors of selling corporation, 443.

COURTS.

See **FEDERAL COURTS.**

jurisdiction of state court of suit for violation of rates fixed by interstate commerce commission, 20.
 status of a state supreme court as the successor of the territorial court, 75.
 a New York court draws the color line, 118.
 criticizing the court—the California courts and their critics, 158.
 right of action in state court under federal employer's liability act, 219.

COVENANTS,

the nature of covenants running with the land as determinative in party wall agreements, 42, 44.

CRIMINAL LAW,

conviction of second offense, 110.
 constitutionality of the Bertillon system, 164.
 intent in opening letter of another and divulging its contents, 353.
 constitutional requirements as to form in writs and processes, 407.

CRIMINAL TRIAL,

rebuke by court of misconduct as curing error, 128.

CUSTOMS,

the legal effect of the maximum provision of the Aldrich-Payne tariff law, 414.

DAMAGES,

injury from fright where there is no physical impact, 389.
 damages for mental anguish in telegraph cases, 416.
 instructing jury to award merely nominal damages in case of death of female infant, 460.

DEATH,

death as an adjudicated fact and the conclusiveness of the adjudication, 169, 171.
 does the statutory action for death abate by the subsequent death of the beneficiary, 199.
 instructing jury to award merely nominal damages in case of death of female infant, 460.

DEEDS,

assignability of right of re-entry, 237.

DESCENT AND DISTRIBUTION,

the Arkansas statute of descents applied to allotments in Indian lands—do allottees take by purchase or descent, 181.
 the postmortem administration of wills, 371.

DIGEST OF CURRENT OPINIONS,

14, 32, 49, 67, 85, 103, 122, 140, 158, 176, 194, 212, 230, 253, 272, 290, 310, 328, 347, 364, 382, 400, 418, 436, 454, 472.

DIVORCE,

does the mere ownership of valuable non-income property by the wife bar alimony, 61, 63.
 ex-justice Brown on the policy of our divorce legislation, 127.
 the policy of divorce legislation, 184.

EMPLOYER'S LIABILITY ACT.

what employees come within the federal employer's liability act, 166.
 right to sue in state courts, 219.
 history and construction of the federal employer's liability act, 221.
 have state courts jurisdiction of suits under the federal employer's liability act, 235.
 comity of state courts with reference to the federal employer's liability act, 259.
 the rule of evidence in suits under the federal employer's liability act, 277.
 decision upon the safety appliance act as foreshadowing decision upon the employer's liability act, 295.
 constitutionality and construction of the federal employer's liability act, 297.
 to what employees the act is applicable, 298.
 contributory negligence under the federal employer's liability act, 300.

EMPLOYER'S LIABILITY ACT (Continued).

release of damages under the federal employer's liability act, 305.
 jurisdiction of state courts over suits under federal employer's liability act, 309.
 comparative negligence under the federal employer's liability act, 425.
 validity of employer's liability act in the territories, 462.

ESCHEAT,

dummy corporation organized to defeat escheat, 261.

EVIDENCE,

is a railway ticket in its ordinary form exclusive evidence between the traveler and the conductor, of the traveler's right to be carried, 21.
 the rule of evidence in suits under the federal employer's liability act, 277.
 relaxation of the rule excluding proof of similar acts where there were no witnesses to an accident causing death, 284, 286.

acts done by plaintiff in physical examination to enable physician to testify, 335.

EXTRADITION,

trial confined to offense for which prisoner was extradited—treaty provisions, 75.

FACTORS AND BROKERS,

whether the placing of lands in the hands of a broker for sale gives him exclusive right as against the owner, 200.

FEDERAL COURTS,

removability of causes to a jurisdiction in federal courts—the non-separable controversy theory distinguished, 1.

removability based upon jurisdictional venue, 3.

federal jurisdiction in suits arising under the constitution or laws of the United States, 19.

jurisdiction of state court of suit for violation of rates fixed by interstate commerce commission, 20.

the judicial cognizance of federal as compared with state courts, 37.

the principle of reluctance on the part of federal courts to interpose against the enforcement of a state's fiscal laws, 37.
 rate regulation and interference by federal courts therewith, 55.

it being alleged that the state enactment is confiscatory, have the federal courts jurisdiction to restrain its enforcement, 53.
 the impracticable organization of the federal courts of appeals, 217.

right of action in state court under federal employer's liability act, 219.

have state courts jurisdiction of suits under the federal employer's liability act, 235.

comity of state courts with reference to the federal employer's liability act, 259.

origin and basis of the rule that in determining riparian rights the United States courts follow the decisions of the Supreme Court of the state in which the controversy arises, 262.

jurisdiction of state courts over suits under federal employer's liability act, 309.

FIRE INSURANCE,

unsettled decisions as to clause in insurance policy as to unconditional and sole ownership in property, 154, 155.

FRAUD,

constructive bad faith in receiving moneys from a bank teller not in the ordinary course of business, 346.

FRAUDS, STATUTE OF,

parol reservation as affecting deeds, 191.
 growing crops as part of land conveyed—conflict of decisions as to parol reservation, 192.

FRIGHT,

See **DAMAGES.**

GAMBLING,

See **ILLEGALITY.**

HIGHWAYS,

rights of abutting owners as to reasonable use, 74.
 operating vehicle without a license as raising defense of contributory negligence, 346, 451.
 responsibility of owner of automobile as a dangerous machine upon the highway, 359, 360.

HIGHWAYS (Continued).

can the public by user accept a dedication of a street or highway so as to bind a municipality, 426.

HUMOR OF THE LAW,

13, 31, 43, 66, 84, 102, 121, 139, 157, 175, 193, 211, 229, 252, 271, 289, 309, 327, 346, 363, 381, 399, 417, 435, 453, 471.

HUSBAND AND WIFE,

action for tort by one against the other, 184.

ILLEGALITY,

distinction between "by lot" and "lottery," 147.

right to recover money advanced to carry out an illegal contract, 279.

right to recover money advanced to carry into execution a contract known by the lender to be illegal, 351.

illegal consideration in sale of immoral literature, 354.

INDIANS AND INDIAN LANDS,

the Arkansas statute of descents applied to allotments in Indian lands—do allottees take by purchase or descent, 181.

INFANCY,

distinction between civil and common law in computation of age, 38.

power and extent thereof, of infant to bind himself by his contract to render services, 323, 324.

the law as to disaffirmance during minority of infant's contracts, 432, 433.

INITIATIVE,

See CONSTITUTIONAL LAW.

INJUNCTION,

federal injunction of state officials to prevent the enforcement of laws claimed to be confiscatory, 39, 58, 76.

may a court compel the violation of an injunction, 280.

enjoining argument by persuasion to induce one to join a labor union, 315.

INSANE PERSONS,

an abominable anachronism of justice—incarceration of persons alleged to be insane without the intervention of a jury, 183.

resistance by state criminal authorities to application for release from confinement in an insane asylum, 251.

right to trial by jury in inquisitions to determine insanity, 270.

INSURANCE,

See BENEFIT SOCIETIES.

See FIRE INSURANCE.

liberality of construction of insurance policy in the saving of the insurance, 450.

INTOXICATING LIQUORS,

prohibition as avoiding leases, 147.

what is a "bar," 381.

JUDGMENTS,

judgment by confession—rule at common law and statutory provisions, 110.

effect on a judgment of disqualification of the judge by reason of interest or relationship to a party, 407.

LAW AND LAWYERS,

English efforts for the decentralization of justice, 11.

a case about a pig, 46.

a reconstruction judge, 64.

the 1909 meeting of the American Bar Association, 101.

technicalities of procedure—Judge Lawson and his critics, 109.

little stories of law and lawyers, 112.

the necessity of idealism in teaching law, 120.

plithy expressions by Sir Edward Coke, 193.

the altruistic quality of the lawyer subjectively considered, 287.

law in books and law in action, 362.

women and the law, 397.

LAW BOOKS,

Miscellaneous, buckram or sheep binding for law books, 11.

Lawyer's Common Place Book, 139.

Select Essays in Anglo-American Legal History, Vol. 3, 398.

Morris' History of the Development of Law, 417.

Scott's Evolution of Law, 435.

LAW BOOKS (Continued).

Reviews of Digests,

American Bankruptcy Reports Digest, Vol. 2, 121.

Missouri Digest, Vols. 12 and 13, 239.

Reviews of Encyclopedias,

Cyclopedia of Law & Procedure, Vol. 31, 48.

Cyclopedia of Law and Procedure, Vol. 32, 120.

Encyclopedia of Evidence, Vol. 13, 252.

American & English Encyclopedia of Law and Practice, Vol. 1, 399.

Cyclopedia of Law & Procedure, Vol. 33, 435.

Reviews of Reports,

American State Reports, Vol. 126, 229.

American State Reports, Vol. 127, 435.

Reviews of Text Books,

Sedgwick's Elements of Damages, second edition, 13.

Scanlan's Law of Church and Grave, 48.

White on Personal Injuries on Railroads, 48.

Tiffany's Personal and Domestic Relations, 211.

Jewett's Election Manual, 17th edition, 229.

Cooke's Criminal Code, 229.

Frost on New York Corporations, 252.

Alexander's Lien Laws of the Southeastern States, 289.

Macomber's Fixed Law of Patents, 398.

Scott's Courts of the State of New York, 435.

LIBEL AND SLANDER,

what is libelous per se as to a business corporation, 39.

legal liability of the "knocker," 151.

responsibility of a mercantile agency for libel and slander, 423.

MASTER AND SERVANT,

place rendered unsafe by independent contractor, 201.

the constitutionality of statute requiring master to give written reason for discharge, 219.

MAXIMS,

some observation on the extent of the operation of the maxim quod ab initio non valet intractu temporis non convalescet, 443.

MECHANIC'S LIENS,

adjudication in bankruptcy as affecting the lien of a sub-contractor, 99, 100, 174.

MENTAL ANGUISH,

See DAMAGES.

MERCANTILE AGENCIES,

responsibility of a mercantile agency for libel and slander, 423.

MONOPOLIES,

a proposed solution of the trust question by a distinguished lawyer of Virginia, 47.

dissolving the insurance trust without the aid of a statute and upon common law principles, 73.

how to control the trusts with justice to the people and without destroying property, 238.

is the Sherman Act as construed repugnant to the constitution of the United States, 238.

some reflections about the opinion and decree in the Standard Oil case, 459.

MUNICIPAL CORPORATIONS,

permitting private trespassing on public property, 135.

operating vehicle without a license as raising defense of contributory negligence, 346, 451.

ordinance invalid as conferring unlimited discretion on city official, 370.

NATURALIZATION,

construction of requirement of "good moral character," 411, 413.

NEGLIGENCE,

private necessity of a third person as restricted upon one's use of his own property, 10.

negligent proximity to the heels of a mule, 65.

NEGLIGENCE (Continued).

- is the duty of a railroad company to trespassers a negative duty, 111.
- the beginning of the doctrine of imputed negligence and the situation in which its repudiation leaves guests of drivers and associates in common enterprises, 228.
- duty of proprietors of theaters, amusement gardens, etc., as to safety of patrons, 248, 250.
- negligence of a bank as proximate cause of defalcation by teller in a suit against a third person, 345.
- operating vehicle without a license as raising defense of contributory negligence, 346, 451.

NEW TRIALS.

- ending litigation by narrowing the issues and granting partial new trial, 425.

NUISANCES.

- contributory negligence not available to defendant in a nuisance case, 136.
- is a motor public vehicle a nuisance, 470.

OFFICERS.

- right to charge fees for service for which the statute makes no provision, 261.

PARENT AND CHILD.

- instructing jury to award merely nominal damages in case of death of female infant, 460.

PARTNERSHIP.

- transfer by insolvent firm of its property to pay individual debts, 208, 209.

PARTY WALL.

- the nature of covenants running with the land as determinative in party wall agreements, 42, 44.

PAYMENT.

- distinction in presumption of payment a bar by statute of limitations, 81, 83.

PLEA IN ABATEMENT.

- resetting of cause by agreement as constituting a waiver of attack on jurisdiction, 165.

PLEADING.

- resetting of cause by agreement as constituting a waiver of attack on jurisdiction, 165.

POLICE POWER.

- liquor, lottery tickets, lung fever, and the police power, 91.

PRINCIPAL AND AGENT.

- whether the placing of lands in the hands of a broker for sale gives him exclusive right as against the owner, 200.
- delivery of bank funds by a teller to one not presenting check therefor, 333.
- authority of an agent over money in his custody belonging apparently to another, 343.
- where agent attempts to act for other than his principal while engaged in the latter's business, 344.

PRIVACY.

- right of action for violation of right of privacy, 92.

PROHIBITION.

- See INTOXICATING LIQUORS.

PUBLIC POLICY.

- division of fees between laymen and lawyer as contrary to public policy, 115.
- fallacy of the doctrine of public policy, 326.

RAILROADS.

- See EMPLOYER'S LIABILITY ACT.
- See SAFETY APPLIANCE ACTS.
- the fallacies of railroad rate regulation, 3.
- liability of railroad for proper use of its own tracks resulting in interference with the fire department of a city, 9.
- rate regulation and interference by federal courts therewith, 55.
- fellow servant doctrine—waiver by employee of express company enuring to railroad company, 57.
- is the duty of a railroad company to trespassers a negative duty, 111.

RECEIVERS.

- receivers suing in foreign jurisdiction—those cases in which the determining feature is the kind of receiver, 317.
- receivers suing in foreign jurisdiction—those cases in which the determining feature is the parties to or affected by the suit, 335.
- receivers suing in foreign jurisdiction—

RECEIVERS (Continued).

- those cases in which the question turns upon the capacity in which the receiver sues, 339.

REFERENDUM.

- See CONSTITUTIONAL LAW.

REMOVAL OF CAUSES.

- See FEDERAL COURTS.

SAFETY APPLIANCE ACT.

- decision upon the safety appliance act as foreshadowing decision upon the employer's liability act, 295.
- peremptory instructions in suit for penalties under the federal safety appliance acts, 387.

SALES.

- vendor's privilege in Louisiana, 93.
- distinction between "by lot" and "lottery," 147.
- right of rescission, 183.
- property tendered upon condition that buyer pays cash, 220.
- remedy of seller notified before shipment that buyer will not accept delivery, 467, 469.

SHOWS.

- See THEATERS.

SOCIETIES.

- See BENEFIT SOCIETIES.

SPANISH SWINDLE.

- the so-called Spanish Swindle, 452.

STREETS.

- See HIGHWAYS.

SUNDAY.

- collection of rents due on Sunday, 156.

TARIFF.

- the legal effect of the maximum provision of the Aldrich-Payne tariff law, 414.

TAXATION.

- the legal effect of the maximum provision of the Aldrich-Payne tariff law, 414.

TECHNICALITIES OF THE LAW.

- See TRIAL AND PROCEDURE.

THEATERS.

- duty of proprietors of theaters, amusement gardens, etc., as to safety of patrons, 248, 250.

TRIAL AND PROCEDURE.

- a reminder of Jarndyce v. Jarndyce—a suggestion to bar associations, 66.
- fairness of a horse swap peculiarly a question for a jury, 84.
- technicalities of procedure—Judge Lawson and his critics, 109.
- rebuke by court of misconduct as curing error, 128.
- committee of New York Supreme Court Judges would abolish demurrer, 138.
- resetting of cause by agreement as constituting a waiver of attack on jurisdiction, 165.
- a trial by rice, 210.
- the movement for the lessening of reversals in appellate courts, 405.
- ending litigation by narrowing the issues and granting partial new trial, 425.
- some observation on the extent of the operation of the maxim quod ab initio non valet intractu temporis non convalescet, 443.

USURY.

- prosecuting usury in the keeping of a disorderly house, 192.

WATERS AND WATER COURSES.

- responsibility of waterworks company for fires, 58.
- recovery of damages for pollution of water courses, 135.
- origin and basis of the rule that in determining riparian rights the United States courts follow the decisions of the Supreme Court of the state in which the controversy arises, 262.

WILLS.

- Isaac Walton's will, 46.
- the post mortem administration of wills, 371.

WORK AND LABOR.

- the justification for the distinction of wage earners as a class, 12.
- enjoining argument by persuasion to induce one to join a labor union, 315.

SUBJECT-INDEX

TO ALL THE "DIGESTS OF CURRENT OPINIONS" IN VOL. 69

This subject-index contains a reference under its appropriate head to every digest of current opinions which has appeared in the volume. The references, of course are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head, for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.

Abatement and Revival—assignability, 67; death of party, 103; death of plaintiff, 436. dismissal, 290.

Accession—right to follow chattel, 454.

Accident Insurance—assessments, 85; change of business, 272; construction, 14, 158, 194, 212, 364, 418; coroner's verdict, 310; exposure to unnecessary danger, 418; immediate notice, 14; indemnity insurance, 35; notice of sickness, 176; proofs of loss, 14, 210; time for bringing action, 14; waiver of proofs of loss, 272.

Accord and Satisfaction—consideration, 400; new consideration, 140; nudum pactum, 103; part payment of unliquidated claim, 212.

Account—right of action, 436.

Account Stated—failure to object, 436.

Acknowledgment—separate examination, 85.

Action—conditions precedent, 230; contract of tort, 32, 290, 310; cumulative remedies, 454; distinction between legal and equitable, 32; equitable proceedings, 454; equitable relief, 140; injury to unlawful business, 364; joinder of cause, 32; misconduct of plaintiff, 290; misjoinder, 85, 158, 194, 472; nature and form, 382, 418; offer of performance, 253; promise to third person, 272; what law governs, 253.

Adoption—formalities required, 418.

Adverse Possession—acquisitions of title, 454; claim of right, 32, 418; color of title, 49, 85, 230, 364; continuity of possession, 436; cutting timber, 272, 400; defense, 158, 194; grantee of mortgage, 364; hostile character, 328, 364; nature and requisites, 310; notice, 122; outstanding claim, 85; overflowed land, 85; paper title, 67; prescription, 85, 272; presumption of deed, 272; property dedicated to public use, 49; taking successive possessions, 472; school lands, 364; tax sale, 67; uninclosed private lands, 472; what constitutes, 400.

Affidavits—attorney of party, 67; sufficiency, 382.

Aliens—Chinese persons, 14; minor son of Chinese persons, 472; naturalization, 122.

Alteration of Instruments—effect, 454; erasure, 436; interlineation, 67; mortgages, 176.

Animals—judicial notice, 85; vicious dogs, 32.

Annuities—rights of assignee, 290.

Appeal and Error—bona fide holder, 140; disposition of cause of appeal, 14; employee's statutory liability, 32; evidence not brought up in record, 454; examination of adverse party, 349; facts not shown by record, 32; failure to take cross appeal, 472; finality of order, 472; harmless error, 67; judgment, 49; judgment of appellate court, 122; limited to questions raised, 67; matters considered on rehearing, 472; misjoinder of causes, 472; necessary parties, 67; nonsuit, 122; photographs, 158, 194; pleading, 140; presumption where all evidence not shown, 122; question not raised, 122; questions of fact, 32; record paper, 122; review, 472; view of verdict, 14; right of appeal, 472; service of summons, 364; theory of trial, 122; validity, 140; view of locus in quo, 85; withdrawal of assignments of error, 122.

Arbitration and Award—consideration, 382; revocation, 103.

Army and Navy—court martial, 49.

Arrest—Sunday law violation, 272.

Assault and Battery—aiming pistol at another, 436; injury to passenger, 280; justification, 103; nature and liability, 310; self-defense, 382.

Assignments—advice of counsel, 194; building contractor, 158; contracts assignable, 176; form, 328; future earnings, 364; non-negotiable contract, 374; rights passing as incidents, 14; unliquidated claim for damages, 272.

Assignments for Benefit of Creditors—set-off, 140.

Associations—action against unincorporated society, 212; by-laws, 290; liability of members, 103; right of members to sue, 253; right to form, 14.

Assumpsit, Action on—common counts, 176; when attainable, 382.

Attachment—advice of counsel, 158, 194; affidavit for, 85, 158, 194; after acquired title, 85; dismissal, 140; liability on bond, 230; order amending writ, 418; sale under void judgment, 400; suit on bond, 122; title of purchaser, 103; wrongful attachment, 103.

Attorney and Client—action for compensation, 32; attorney's lien, 176; authority of attorney, 85; employment of assistant counsel, 310; false personation, 67; conditional fee, 418; confidential relations, 364; disbarment, 13, 32, 364; involuntary petition, 454; lien of attorney, 32; right of attorney, 32.

Auction and Auctioneer—acceptance of bid, 49.

Audita Querela—review of judgment, 85.

Auctions and Auctioneers—binding effect of bid, 49.

Automobile—ordinary care, 272.

Ball—conditions of appearance bond, 418; right to ball, 14.

Ballment—estoppel to deny title of ballor, 382; injury to bailed property, 253.

Bankruptcy—action against bankrupt, 436; action against trustee, 176; action by trustee, 436; acts of bankrupt, 400; adjudication, 400; adjudication after jury trial, 230; adjudication against bankrupt, 228; after acquired property, 158, 194; allowance of claim, 328; amendment of schedule, 272; appealable orders, 364; assets, 400; attorney's fees, 418; bill of sale, 418; claims, 14, 328, 382, 436; claims entitled to priority, 382; composition, 272; concealment of assets, 272, 328; concealment of assets by partner, 400; concealment of property, 400; conditional sale, 400; continuance, 14; corporations, 364; corporations chartered for a certain purpose, 356; custody of property, 290; debts entitled to preference, 400; discharge, 140, 386, 400, 418; distribution of assets, 364; effect of composition, 400; effect of failure to ask discharge, 382; equitable assignment, 328; examination of bankrupt prisoner, 418; exemptions, 32, 272, 364, 382, 386, 400; exemptions as to wearing apparel, 382; expenses of estate, 436; filing of petition, 176; fraudulent transfer, 436; garnishment, 386, 400; hearing, 32; indebtedness, 14; insolvency proceedings, 401; interest of trustee, 418; involuntary proceedings, 14, 49, 382; issuance of warehouse receipts, 418; jurisdiction, 272, 364; jurisdiction of court, 418; liens of attachment, 364; liens on exempt property, 419; life insurance policies, 401; liquor license, 364; mutual debts and credits, 328; objections to evidence, 364; order to surrender property, 14; order to turn over property, 382; ownership of property, 222; partnership, 272; partnership property, 383; payment of debts, 436; pending action, 472; petition, 32, 454; possession of receiver, 14; preferences, 272, 328, 365, 401, 419, 436; preferred claims, 32; preferred stock, 401; presumptions, 365; priority of claims, 14; procedure, 436; proceedings against adverse claim-

ant, 436; promise to pay debt, 212; proof of claim, 38; provable cause, 14; referee orders, 365; rights of creditors, 401; rights of trustees, 230; rights vesting in trustees, 401; sale of attached property, 383; secured debt, 454; stay of proceedings, 32; time for proving claim, 383; title and rights of tenants, 383; title of trustee, 310; trust funds, 365, unliquidated claim, 273; unliquidated damages, 401; unpaid stock subscriptions, 365; voidable preferences, 454; waiver of defense, 253; withheld assets, 328; withholding assets, 401.

Banks and Banking—authority of cashier, 436; bills and notes, 122; bona fide holder, 436; certificate of deposit, 419, 454; checks, 130, 365; clearing house, 67; comptroller, 158, 194; criminal responsibility, 328; deposit slip, 158, 194; duty of director, 103; equitable proceedings, 454; insolvency, 103; knowledge of cashier as notice to bank, 212; making false reports, 419; national bank exceeding power, 273; obligation of bank, 253; payment of check, 67; powers of president, 38; receiving deposits when insolvent, 38; relation between depositor and bank, 253; rescission of contract, 419; title to assets, 472; transfer of deposit on oral order, 290; ultra vires, 273; ultra vires acts, 365, 472.

Bastards—inheritance, 49.

Benefit Societies—answer in application, 67; beneficiaries, 212; cause of death, 383; change of by-laws, 103; classes of beneficiaries, 85; construction of benefit certificate, 230; dues and assessments, 158, 194; estoppel, 122, 158, 194; foreign, 67; liability of successor, 365; spitting and coughing, 365; suspension of members, 328; waiver of rules, 273.

Bigamy—evidence, 437.

Bills and Notes—acceptance of check, 230; accommodation, 437; accommodation indorser, 67, 103; accommodation notes, 290; accommodation paper, 437; action on draft, 437; agency, 158, 194; assignment, 33, 103, 310, 419; attorney's fees, 419; bank check, 15; bill of exchange, 401; bona fide purchaser, 49, 140, 176, 212, 310; boundaries acting on agreement, 68; burden of proof, 158; burden of proving assignment, 290; burden of proving payment, 472; collateral assignment, 33; common law seal, 67; conditional delivery, 85; conditions precedent, 472; consideration, 15, 33, 85, 103, 176, 212, 310, 472; construction, 49; defenses, 253, 273; delay in presentation of check, 419; delivery, 68, 328; dishonor, 365; estoppel, 122, 158, 194; evidence, 158, 194; extension consideration, 86; foreign bill of exchange, 328; forgery, 273; illegal consideration, 176, 212; illegality, 273; indorse in good faith, 68; indorsement, 15; indorsement before delivery, 419; indorser, 273; intoxication, 273; joint and severable liability, 437; liability of indorser, 253, 328; liability of payee to make, 253; mental incapacity of maker, 290; nature of liability, 176; negotiable note, 63; option on default, 273; place of payment, 383; pleading, 310; pleading payment, 104; present debt, 273; presentment and demand, 310; presumption, 212; presumption of payment, 273; renewal note, 33; right to sue, 176; transfer, 310; what law governs, 49.

Bills of Lading—title, 158, 194.

Bonds—benefit of third persons, 88.

Boundaries—absence of monuments, 437; center of street, 273; conflicting descriptions, 365; evidence, 49; field notes, 104; land bordering on navigable stream, 104; monuments, 401; private alley, 419; unnavigable stream, 401; withdrawal, 158.

Breach of Marriage Promise—action *ex contractu*, 328; defenses, 253.

Brokers—accounting, 401; acting in double capacity, 419; action for commissioner, 104; authority to sell on credit, 454; commissions, 140, 273, 383; constructive fraud, 365; contract of employment, 33; earmarks to stock, 365; employment, 310; joint rates, 230; licenses, 383; negligence, 104, 253; notice of delivery, 104; revocation of agency, 365; revocation of authority, 253; right to commission, 49, 176; sale of land, 140; scope of authority, 254; sufficiency of service, 290; withdrawal, 158, 194.

Building and Loan Association—interest and premium, 159, 195; receivership, 68.

Cancellation of Instruments—conditions precedent, 437; evidence, 122; failure of consideration, 365; injunction, 195; injunction bond, 159; laches, 254.

Carriers—approaches of station, 437; assault by carrier's servant, 15; bailment, 86; bill of lading, 329; burden of proving contributory negligence, 419; burden of proving exemption, 472; care required toward passenger, 290; carriage of goods, 140, 176, 316; carriage of live stock, 15, 176, 254 472; carriers of passengers, 437; change of cars, 159, 195; circus trains, 33; common carrier, 273; conditions of waiting room, 140; connecting carriers 383; connecting lines, 68; contract of shipment, 437; contract to receive, 273; contracts limiting liability, 290, 473; contributory negligence, 273; damages, 176, 365; degree of care, 86, 273; delay in delivering freight, 212; delay in transportation, 140; derailment, 123; discovered peril, 310; discrimination, 473; due care, 159, 195; duty of shipper to inspect pens, 365; duty to provide cars, 329; duty toward intoxicated passenger, 437; exemption from negligence, 159, 195; fares charged clergymen, 454; injury to alighting passengers, 365; injury to licensee, 176; injury to live stock shipment, 311; injury to person accompanying passenger, 176; injury to persons at station, 15; interstate commerce act, 49, 437; jurisdiction, 401; liability for acts of local officers, 230; liability of connecting carrier, 177, 290; liability of initial carrier, 230, 329; lien for supplies to tenant, 329; limitation of liability, 86, 140; live stock, 254; loss caused by vicious animal, 212; loss of goods, 437; measure of damages, 123; non-performance of obligation, 140; orders of railroad commissioners, 454; penalties, 401; place of contract, 68; presumption of negligence, 86, 123; protection of passenger, 273; proximate cause of injury, 50; punitive damages, 419; refusal to furnish refrigerator cars, 15; refusal to receive freight, 212; regulation, 212, 230; shipper's remarks, 273; special damages, 419; stipulation for notice, 86; telephone companies, 159, 195; tender of freight, 15; transportation of live stock, 383; unloading, 230; use of station by hackman, 290; validity of regulation, 455; warehouse, 254; who are common carriers, 33; who are passengers, 177, 254; wrongfully searching passenger, 140.

Certiorari—nature of remedy, 455.

ChamPERTY and Maintenance—contracts avoided, 177; contract for contingent fee, 33.

Charities—application of cy-pres doctrine, 159, 195; estate acquired, 254; liability for torts, 140.

Chattel Mortgages—amount of debt, 437; assignment, 230; assignment of salary, 254; constructive notice, 68; corporate property, 329; description of property, 365; foreclosure, 365, 401; future advances, 273; judicial sale, 329; lien, 177; notice of delivery, 104; place of record, 455; retention of possession, 141; rights of owner of property, 401; seizure, 159, 195; taking possession of stolen property, 254.

Colleges and Universities—actions against, 230.

Commerce—navigable streams, 437; plenary power of congress, 273; powers of state, 231; constructive delivery, 123; inspection of kerosene oil, 455; interstate commerce, 401; regulation, 290; safety appliances, 273.

Common Law—cessat ratio, 159, 195; compounding felony, 310.

Compromise and Settlement—conclusiveness, 159, 195; effect of, 86; execution of notes, 437; impeachment, 231; mistake, 419; presumption, 123; validity, 104, 254.

Conditional Sale—subsequent purchaser, 86.

Confusion—commingling of funds, 231.

Conspiracy—agricultural reports, 33; combination of laborers, 329; concealment of bankrupt assets, 329; nature of elements, 290; strikes, 15.

Constitutional Law—amendments, 15, 104; city ordinance, 273; classification, 68; conflicting amendments, 141, 159, 195; determination of constitutional questions, 437; distribution of power, 33; due process, 455; equal protection of law, 50; equality, 140; executive discretion, 419; foreign corporations, 33; freedom of contract, 15; impairment of contract, 419, 473; initiative amendment, 473; judicial powers, 311; liquor license, 33; municipal ordinance, 472; negroes, 86; obligation of contracts, 231; performance of contract, 212; police power, 33, 68; police regulation, 419; prescribing, 15; public service commission, 33; right of privacy, 254, 329; right of third person to sue, 329; right to justice without delay, 383; right to question unconstitutional act, 455; right to sue state, 455; statutes, 365, 414; temporary alimony, 455; use of public property, 15.

Contempt—advising client to disobey order, 383; purging contempt, 104; receiver, 68; separate maintenance, 68; sufficiency of evidence, 50; violation, 401.

Contracts—acceptance of compliance, 274; agreements for benefit of third persons, 141; building contracts, 437; burden of proof, 159, 195; conditions precedent, 254; consideration, 68; consideration, 177; construction, 50, 104, 141, 159, 195, 254, 383, 437; contingency, 68; creditor's suits, 291; delay in performance, 401; dividing fees with laymen, 274; enforcement, 365; estoppel, 159, 195; evidence, 291; exception named, 68; extrinsic evidence, 33; failure, 311; forfeiture, 291; guaranty, 437; illiteracy, 274; intention of parties, 402; intent, 33; joint and several obligation, 50; legality, 419; moral obligation, 472; mutuality, 473; notice of lien, 291; offer and acceptance, 329; ownership of stock, 212; party at fault, 274; persons occupying fiduciary relations, 254; pleading, 123, 274; public policy, 86, 291; reducing parol to written agreement, 104; renunciation by one party, 311; rescission, 33, 86, 213.

- 402; restraint of trade, 402; rights of third person, 329; right to do business, 15; signature of one party, 329; special contract, 123; tending to create monopolies, 33; time for performance, 33, 50; void as against public policy, 177; variance in actions on, 455; validity, 15, 254, 473; violation of statute, 15; waiver, 419; what law governs, 291, 311.
- Contribution—joint makers, 274; joint wrongdoers, 291; measure of contribution, 254.
- Conversion—right of heirs, 141.
- Convicts—assault on prison officer, 104.
- Copyrights—action for infringement, 231; dramatization of story, 33; extent of rights acquired, 329 injunction, 34; literary compensation, 34.
- Corporations—action against, 254; actions against foreign corporations, 15; action between stockholder, 141; action by stockholder, 50, 311; assets in hands of stockholders, 177; assignment of claims, 473; assumption of debts, 274; authority of agent, 213; authority of officers, 212; authority of treasurer to deposit fund, 333; by-laws, 329; capacity to sue, 473; capital stock an asset of liability, 291; certificate of stock, 291; change of purpose, 104; compliance with state statutes, 34; consolidation, 159, 195; contract for guaranty, 231; contract of employment, 291; corporate action, 123; debts entitled to preference, 386; delinquent stock assessment, 104; dividends by insolvent corporation, 231; doing business in foreign state, 15; duty of directors, 15; effect of dissolution, 438; estoppel, 34, 177, 254; excusing non-performance, 402; failure to file certificate of incorporation, 402; fiduciary relations of promoter, 419; foreign corporations, 15, 213; forfeiture of franchise, 104; fraudulent transaction, 141; illegal acts, 50; implied powers, 274; insolvency, 159, 195; intervention by stockholder, 455; invalid corporation, 231; jurisdiction of supreme court, 255; leases, 473; liability of officer for misapplication of funds, 455; liability of stockholder, 15; liability for torts, 141; liability for wrongs, 231; limitation, 159, 195; misconduct of directors, 15; misuse of funds, 34; nonassessable stock, 231; notes, 105; note and mortgage, 473; organization, 203; organization prohibited from holding land, 438; payment of debt by stockholder, 402; personal contract, 159, 195; plea in abatement, 455; pledge of stock, 254; power to hold stock of other corporations, 104; power to sell property, 254; public service corporation, 255; ratification of agent's acts, 402; receivership, 69; recovery from official of debt unlawfully contracted, 438; rescission, 383; rights of stockholders, 255, 329, 383; rights of stockholder to subscribe new stock, 34; right to come into state, 177; right to do business in foreign state, 15, 366; right to sue, 383; right to vote stock, 213 sale of official position, 34; sale of stock, 329; service of process, 15; service of summons, 365; service on foreign corporations, 291, 329; showing with other creditors, 274; similarity of names, 159, 195; stockholders, 438; stockholder's liability, 34, 365; stock voting trust, 213; suit by stockholder, 159, 195; suit for infringement, 329; transfer of certificate, 474; transfer of stock, 366; ultra vires, 16, 274; ultra vires act, 438; unpaid part of subscription, 123; unpaid stockholder, 159; unpaid subscription, 34, 159, 195, 329; unsubscribed stock, 86; validity of by-laws, 255.
- Costs—attorney's fee, 123; persons liable, 16; statutory provisions, 291.
- Counties—actions against, 437; liability for county money, 177.
- Courts—determination of constitutional questions, 255; federal courts, 402; federal decision, 86; jurisdiction, 69, 159, 195, 274, 438; jurisdiction over interstate shipments, 212; jurisdictional amount, 274; marketable title, 455; stare decisis, 455; what constitutes filing, 455.
- Covenants—action for breach, 255, 420; against incumbrances, 177; costs in defending title, 123; eviction, 86, 274; failure to record conveyance, 123; restraint of competition, 311; restrictive building covenants, 420; running with land, 274, 329; warranty, 255; what law governs, 231; words of client, 16.
- Criminal Evidence—admissibility, 383; circumstantial evidence, 34; conduct and declaration, 105; confession, 123; description of property, 231; exceptions, 104; experts, 196; good character, 291; instruction, 366; other offenses, 177; physical evidence, 311; venue, 34; witnesses, 123.
- Criminal Law—accomplice, 86, 123, 437; acts of epileptics, 383; confession, 141; constitutional provisions, 141; evidence, 160, 196; experts, 160; federal courts, 16; indictments in different jurisdictions, 34; insanity, 34; jurisdiction of supreme court, 366; malice, 438; memorandum of sale, 255; punishment, 311; reception of verdict, 141; stay of execution, 34; when jeopardy begins, 473.
- Criminal Trial—authority to set aside, 329; capacity to commit crime, 255; confession uncorroborated, 69; death of judge, 141; instructions, 105, 311; misdemeanors, 141; preliminary examination, 402; province of court and jury, 16; severance, 329; weight of evidence, 86.
- Curtesy—divorce from bed and board, 177.
- Customs and Usages—exchange of courtesies, 141; knowledge of parties, 105; presumptions, 160, 196; traveling salesman, 274; what constitutes, 402.
- Damages—basis for recovery, 86; breach of contract, 383; builder's contract, 123; certainty, 105; compensatory, 438; computation, 213; consideration, 213; counterclaim, 274; discretion of jury, 213; double damages, 123; duplication, 291; duty to injured person, 311; elements, 402; exemplary, 311; failure to avoid and lessen, 420; failure to pay money, 105; future fate and suffering, 274; instructions, 455; intent of wrongdoer, 402; interest as damages, 231; liquidated damages, 255; measure, 196; medical attendance, 123; measure, 160; mental suffering, 86, 105, 160, 196, 311, 402; mortality tables, 16; pain and suffering, 177; personal injuries, 311, 402; persons liable for keeping unlawful sale, 257; reasonableness of physician's bills, 366; remote consequences, 455; right to regulate sale, 257; riparian owner, 69; signature, 213; value of services of unskilled nurse, 177.
- Death—burden of proving wrongful death, 311; damages, 141, 291, 455; interstate commerce, 403; negligence, 329; presumption, 366; presumption from absences, 365; presumption of due care, 311; right to amount recovered, 438.
- Dedication—acceptance, 160, 196; acts of life tenant, 177; elements, 329; evidence to show, 274; highways, 87; intention, 274; misuser or diversion, 383; offer to dedicate, 420; platting of land, 455; streets, 455; undue influence, 366; what constitutes, 177.

Deeds—absence of proof, 330; ancient document, 231; capacity of grantor, 69; capacity to convey, 213; conditions subsequent, 291, 455; conditions subsequent, 455; consideration, 177, 231, 438; construction, 141; construction, 366; construction, 402; dedication, 366; delivery, 50, 177; destroyed record, 123, 291, 366, 420; evidence, 366; execution in black, 50; failure to read, 383; false representation, 274; fraudulent representations, 177; granting clause, 160, 196; mental capacity to execute, 177; mutual mistake, 366; parol evidence as to consideration, 291; presumption of acceptance, 50; re-delivery, 291; requisites, 291; reservation, 231; restrictions, 231, 274; sale in gross, 384; undue influence, 384.

Descent and Distribution—advancements, 105, 213; collateral heirs, 274; heirs and next of kin, 141; relinquishment, 255; title of heirs, 455; who are heirs, 141.

Dismissal and Nonsuit—want of prosecution, 473.

Divorce—abandonment, 311; alimony, 213; contempt proceedings, 105; cruelty, 367; desertion, 124; domicile at time of suit, 34; failure to pay alimony, 291; fraud, 473; jurisdiction, 87; impeachment, 141; remedy at law, 455; suit money, 291; temporary alimony, 455; vacating decree, 255.

Domicile—change, 420; child's parent, 87; evidence, 384; wife's domicile, 311.

Dower—construction of statute, 420; invalid power, 69; land conveyed before marriage, 438; wife's contract with husband, 255.

Easements—construction, 160, 196; continuous adverse user, 366; establishment, 291; notice to purchase, 105; presumption, 274; reservation and exception, 14; right of way, 105; servient soil, 402; warranty deed, 274; way of necessity, 402, 420, 473.

Ejectment—common source of title, 87, 384; pleading, 455; possession by defendant, 141; right to possession, 34, 141, 420; title, 69; title to support, 255; use and acceptance, 384; weakness of defendant's title, 274.

Election of Remedies—waiver, 141.

Electricity—degree of care, 87; injury incident to production, 255; maintaining uninsulated wire, 311; negligence, 141, 438; res ipsa loquitur, 160, 196; right to use of street, 105; transmission along highway, 16; use of telephone, 291; violation of ordinance, 177.

Embezzlement—defenses, 213; elements of offense, 231; excessive taking, 69; intent, 473.

Eminent Domain—condemnation proceedings, 420; conveyance of land acquired by condemnation, 473; damages, 160, 196; delegation of power, 142; easements, 292; indirect damages, 10; injury to abutting owners, 231; injury to property not taken, 231; irrigation canal, 142; necessity, 231, 438; ordinances, 105; priority of rights, 292; public use, 255, 438; rights acquired, 384; right to compensation, 438; unnecessary injury, 87; use of streets, 292; water rights, 402; what constitutes taking, 366.

Equitable Title—execution, 214.

Equity—adequacy of other remedies, 438; amendment to bill, 384; bill of review, 231; complete relief, 34; cross bill, 255, 420; decree pro confesso, 213; federal courts, 384; defenses, 384; fraud, 420; jurisdiction, 16, 50, 87, 124, 292; laches, 274; mistake of law, 402; multifarious bill, 213; parties in part delicto, 34 relief against penalty, 292; remedy at law, 16; right to equitable relief, 311; state demand, 87; supplemental pleadings, 87.

Escrows—common law rule, 473; delivery, 160, 196; effect of deposit, 255; nature and requisites, 232.

Estates—merger, 231.

Estoppel—acts constituting, 330; by deed, 438; claims inconsistent with prior claims, 178; common grantor, 275; conclusiveness, 34, 330; conduct, 275; constructive knowledge, 142; creditors, 160, 196; extent of estoppel, 34; grounds of doctrine, 16; husband and wife, 16; inconsistent positions, 438; intent, 142; judicial notice, 474; matter in pais, 275; ownership of property, 213; persons affected, 142; pleading, 255, 366, 420; pledge of stock, 474; position assumed, 213; prejudice to person setting up estoppel, 178; recital in contract, 178; reliance on representation, 69; title of common grantor, 420; void sale, 420; what constitutes, 292.

Evidence—admissibility, 213, 330; admissions, 420; assignment of life policy, 384; bill of sale, 456; bodily pain and suffering, 384; book entries, 473; burden of proof, 194, 384; city ordinance, 69; competency, 292; consideration, 384; consideration of deed, 403; construction, 384; contemporaneous agreement, 213; contents of letters, 366; copy of telegram, 232; death certificate, 178; decisions of federal court, 420; declarations, 105, 178; declaration against interest, 330; declarations as to pain and suffering, 311; declaration of agent, 456; declaration of owner in possession, 292; dedication, 105; deed, 160, 196, 255; description in deed, 275; estoppel, 275; evidence of proof, 142; evidence taken at former trial, 292; exemplary damages, 160, 196; exemptions, 196; experts, 124; expert witness, 87; explanation of terms, 50; expressions of bodily and mental feelings, 50; failure to sustain burden of proof, 105; general reputation, 275; handwriting, 16, 34, 232; hearsay, 106, 311; hypothetical question, 330; inherent improbability, 69; intent, 50, 474; judicial evidence, 213; judicial notice, 34, 69, 87, 160, 196, 214, 438, 456; law of foreign state, 403; law of other state, 87, 366; legislative resolve, 420; loss of baggage, 474; market reports, 178; minutes of directors, 106; mode of making payment, 384; non-expert witnesses, 366; opinion evidence, 16, 34, 106, 142, 178; oral agreement, 384; ordinary care, 124; parol evidence, 142, 214, 311; parol evidence to vary written contract, 420; parol testimony, 124; past suffering, 87; photographs, 87, 232; positive and negative, 255; powers of agent, 50; presumptions, 50, 106, 142; presumption against suicide, 311; proof of signature, 366; province of jury, 124; punitive and negative testimony, 292; reading medical book to jury, 214; records, 16; relevancy, 330; res gestae, 16, 438; review, 456; schedule time of train, 366; secondary and best, 87; slander, 275; statement of physicians, 275; subornation of witnesses, 330; subscribing witnesses to will, 275; sufficiency, 214; testimony in conflict with natural law, 232; to be within pleading, 275; trade terms, 16; uncontradicted evidence, 87; value of personal property, 312; varying terms of written instruments, 50; varying written contract, 178; verbal acts, 88; witnesses, 124; writings, 16.

Exception—bona fide purchaser, 474.

Exchange—construction of by-laws, 312.

Exchange of Property—rescission, 51, 438; res gestae, 438; sufficiency of title, 254.

Execution—levy, 88; lien, 88; sales, 51; title to purchase, 292.

Executors and Administrators—abatement and revival, 88; attorney's fees, 88, 178, 256; burden of proving claim, 438; claims against estate, 403; compound interest, 474; discharge of surviving administrator, 142; duty to employ counsel, 474; employment of attorney, 330; employment of broker, 142; execution of note, 403; false pretenses, 384; foreign administrators, 160, 196; implied contracts, 292; improved appeal, 474; liabilities, 438; necessary of administration, 124; non-residence, 160, 196; personal privilege, 366; powers to appoint, 384; property held by decedent in trust, 384; rights of heirs, 214; sale of land, 214, 330; statute of limitation, 69; suit to set aside, 70; will contests, 16.

Exemptions—automobile, 160, 196; negligence, 366; residence, 160.

Explosives—care required, 16; duty to shipper, 275; injuries from blasting, 106.

Extradition—jurisdiction, 366.

Factors—power to sell, 142.

False Imprisonment—acts constituting, 16; civil liability, 232, 420; liability, 456; remote damages, 88.

False Pretenses—evidence, 367.

Federal Courts—authority of state court decisions, 330; citizenship of corporation, 384; construction of state statute, 420; decision of supreme court, 403; discrimination against negroes as jurors, 51; district in which suit must be brought, 384; divorce citizenship, 16; following state decisions, 51; full faith and credit, 51; interstate commerce, 232; jurisdiction, 16, 232, 330, 474; law of the case, 420; log room in navigable stream, 51; pleading, 439; presumption, 420; principles of common law, 232; rules of decisions, 16; removal of cause, 420; service of process, 16.

Fire Insurance—acts of insured, 232; additional insurance, 51; authority of agent, 474; change of title, 256; contracts in violation of public interest, 256; duty to read policy, 403; forfeiture, 178; iron safe clause, 403; knowledge of agent, 275; mortgage on part of property, 178; notes given for premium, 292; notice to agent, 367; proof of loss, 16; property covered, 232; time for bringing suit, 142; value of property at time of fire, 330; waiver, 256, 403; waiver of conditions, 17.

Fixtures—abandonment, 312; oil and gas lease, 330; ownership, 256.

Foreign Corporations—actions in tort, 69; plea on abatement, 69.

Forgery—defenses, 35; what constitutes, 106, 456; burden of proof, 292; contracts, 474; contract for well, 88; corporations and officers, 51; damages, 456; elements of fraud,

439; evidence, 51; false representation, 178; matters of fact or opinion, 256; misrepresentation, 403; opinion and fact, 124; prior oral agreement, 88; quantity of land sold, 142; representations, 142; representations of vendor, 367; solvency of corporations, 35; what constitutes, 312.

Frauds, Statute of—agreement to answer for debt of another, 367; authority to sell land, 178; color of title, 106; conveyance of land, 232; conveyance of real estate, 256; debts of another, 214; definite term of service, 275; effect of partial delivery, 178; interest in land, 256; memorandum, 160, 196; oral agreement of lease, 256; oral contract for sale of timber, 292; parol sale of goods, 456; part performance, 275; part performance, 312; place of contract, 275; pleading, 474; promise to answer for debt of another, 232; promise to pay debt of another, 106; scope of agent's authority, 256; sale of land, 367; sale of standing timber, 384; sufficiency of memorandum, 214; title of property, 474; verbal conveyance, 142; written contract, 142.

Fraudulent Conveyances—anticipating indebtedness, 69; burden of proof, 17, 312; effect as between parties, 178; form of transfer, 420; fraudulent transactions, 312; gifts, 439; intent, 330; intent, 439; judgment and execution, 69; knowledge of grantee, 142; levy and execution, 17; liability of grantee to creditor, 292; nominal consideration, 106; participation of grantee, 456; pledge, 124; preferences, 142; rights of grantor, 142; services of insolvent husband rendered wife, 51; situs of debt, 232; subsequent creditors, 142; sufficiency of consideration, 292.

Gaming—description of premises, 70; persons liable, 51; recovery of money lent, 267; validity of gaming obligations, 35.

Garnishee—jurisdiction, 456.

Garnishment—abuse of process, 178; credits of debtor, 330; judgment, 330; judgment based on tort, 275; nature of proceedings, 106; offset by garnishee, 142; operation and effect, 292; persons entitled to service, 474; property subject, 312; situs of debt, 367; strictly construed, 88; suggestion of exemption, 232.

Gifts—delivery to third person in trust, 312; inter vivos, 312; life policy, 421; trusts, 214.

Good Will—elements, 292; what constitutes, 403.

Grand Jury—secrecy of proceedings, 35.

Guaranty—liability of guarantors, 214; unauthorized indorsement of check, 384; when obligation arises, 17.

Guardian and Ward—accounting, 439; assets, 474; jurisdiction, 88; power of attorney, 439; sale of ward's property, 312; termination of relation, 178.

Habeas Corpus—commitment for contempt, 51; custody of child, 88; custody of children, 142; distinguished from writ of error, 70; federal courts, 17; grounds of remedy, 367; legality of arrest, 106; necessity of connection, 421.

Highways—abutting owner, 275; establishment, 456; jurisdiction, 456; obstructions, 17; transfer, 421; use by automobiles, 214.

Homestead—claim of wife, 51; conveyance, 51; abandonment, 142, 178; head of family, 88; lease, 312; mortgage, 178; mortgage as affecting quantity of land, 142; occupancy, 88; pre-existing liens, 292; remainder, 160, 196; rights of surviving husband, 312; rights of wife, 292; selection 214; separation of family, 232; temporary absence of owner, 232; the intent to return, 124; what it embraces, 70.

Homicide—appeal and error, 124; burden of proving malice, 143; evidence, 106, 124; malice, 70; premeditation, 124; prosecution for murder, 124; self-defense, 143; self-defense, 70; variance, 124.

Husband and Wife—actions between, 51; acts of married women, 421; alienating husband's affection, 178; ante-nuptial agreement, 256; antenuptial contract, 275; building erected on wife's land, 214; community funds, 456; contracts between, 334; contract by wife, 421; contract with third persons as partners, 439; conveyance between, 51; damages on account of injury to husband, 456; estate by entirety, 214; injury to husband, 456; injury to wife, 439; lease of joint property, 51; presumption of ownership, 330; sale of husband's property, 293; separate property of wife, 330; support of husband, 51; tenancy in common, 51; wife's right to support and maintenance, 214; wife's title, 403.

Improvements—claim for in ejectment, 124.

Indemnity—adverse possession as against infant, 439; husband and wife, 232; implied contracts, 256.

Indians—suit in relation to Indian land, 421; inheritance in allotment, 275; trespass on Indian land, 421.

Indictment—misdemeanor, 70.

Indictment and Information—authority of legislature, 88; bill of particulars, 214; intoxicating liquors, 256; provisions of federal constitution, 456; statute of limitation, 124; sufficiency, 474; trespass, 143.

Infants—disabilities, 232; disaffirmance of contract, 456; judgment against, 403; repudiation, 256; right to society of infant husband, 474.

Injunction—action in another state, 421; conspiracy to prevent operation of mine, 367; criminal acts, 256; discretion of court, 232; dissolution, 160; enforcement of judgment, 51; enforcing illegal contract, 293; grounds of relief, 17; irreparable injury, 474; jurisdiction, 160; jurisdiction, 196; mandatory injunction, 312; nature of claim, 330; negative covenants, 384; object of will, 474; possession of land pending determination, 456; practice, 160; practice, 196; remedy at law, 330; restraining breach of contract, 456; strikes, 17; suit on bond, 160, 196.

Insane Persons—repudiation of suit by next friend, 52.

Interest—mungling funds, 124; rate on overdue interest, 439.

Internal Revenue—whisky containers, 385.

Interpleader—conflicting claims to fund, 214; conflicting claims to property in warehouse, 214; nature of claim, 330.

Interstate Commerce—food and drugs act, 367; foreign corporation, 403; prosecution for receiving concessions, 384; prosecution for receiving stolen goods, 384; regulation, 17, 421; regulation of train equipment, 17; safety appliance, 385; sale of goods in another state, 456; schedule of trains, 17; what constitutes, 17, 403; interference by states, 143; fellow servants, 473; authority and function, 178; powers of state legislature, 107; public service commission, 439; jurisdiction to enjoin establishment of rate, 439; taking orders for sale of goods, 456; telegraphs and telephones, 456; jurisdiction to enjoin establishment of rate, 439; sale of goods in another state, 456.

Intoxicating Liquors—civil damages, 385; civil damages laws, 256; constitutional law, 83; criminal procedure, 35; criminal prosecution, 35; damages, 52; evidence as to sale, 52; furnishing to minor, 143; injunction, 439; judicial notice, 70; local option laws, 35; "near beer," 214; police powers, 421; 474; prohibition, 70; sale to minors, 178; sale of social club, 403.

Joint Adventures—corporate underwriters, 214; dissolution, 403; mutual rights and liabilities, 214.

Joint Stock Companies—partnership, 456.

Judges—de facto, 257; disqualification, 330.

Judgment—action on judgment of another state, 439; assignment, 143; by confession, 215; cancellation in equity, 275; collateral attack, 88, 257, 421, 474; conclusiveness, 214, 312, 367, 439; construction, 474; correction, 35; correction before entry, 312; default, 35, 106, 232; defects in pleading, 35; dismissal without prejudice, 456; disposition of issues, 143; effect, 70; entry by clerk in vacation, 215; establishment of one of several pleas, 143; foreign judgment, 160; foreign judgment, 196; fraud in procurement, 124; invalidity, 330; joint or severable, 293; joint tortfeasor, 257; joint wrongdoers, 35; jurisdiction, 124; jurisdiction, 475; jurisdiction of property, 106; jurisdiction where served by publication, 257; landlord and tenant, 88; lien, 475; non obstante verdicto, 178; objections to form, 233; opening default, 35, 161, 196; persons concluded, 106, 439; record of, 125; res judicata, 35, 70, 215, 233, 275; revival of dormant judgment, 52; satisfaction, 106; service by publication 275; trespass, 475; vacation, 475; vacating default, 35; validity of default judgment, 312; warrant to confess, 367; when procured by fraud, 330.

Judicial Notice—resale, 88.

Jury—bias, 439; condemnation proceedings, 143; disqualification, 88; equity suit, 125.

Justices of the Peace—appeal, 52; power to punish, 331.

Landlord and Tenant—action for rent, 439; action on lease, 385; agreement to repair, 257; assignment of lease, 475; breach of covenants in lease, 385; construction of lease, 52; defense, 161, 197; division of crop, 125; ejectment, 367; estoppel, 88; growing crops, 457; holding over by lease, 215; injury to third person, 85; landlord's lien, 53; leases, 215, 233, 312; liability for nuisance, 143, 312; liability for rent, 312, 367; liabilities of tenants inter sese, 125; lien for rent, 367; lien for supplies, 331; lien on crops, 143; non-payment of rent, 475; notice to quit, 312; nuisance, 385; option to lessee, 89; restricting leases, 52; summary proceed-

- ings to dispossess, 143; surrender of lease, 143; tenant at will, 257; tenatable condition of premises, 143; termination of relation, 35; vacating default, 35; waiver of conditions in lease, 367.
- Larceny**—indictment, 385, 421; partnership property, 106; possession of stolen goods, 368; title to property, 106.
- Levees**—establishment, 52.
- Libel**—imputing illegal business methods, 275.
- Libel and Slander**—estoppel, 143; forfeiture, 331; instructions, 52; libel per se, 312; malice, 233; meaning of libelous publication, 367; privilege, 161; privilege, 197; privileged communications, 275, 367, 475; publication, 313; slander of title, 89; words imputing in chastity, 257; words libelous per se, 313.
- Licenses**—occupation, 178; revocation, 276.
- Liens**—notice, 233.
- Life Estates**—contract of reinsurance, 457; dividends on stock, 276; termination, 457.
- Life Insurance**—accounting by mutual companies, 52; breach of contract of employment, 293; burden of proof, 475; contract, 70; delivery, 178; different policies, 70; failure to pay premium, 143; insurable interest, 52; premium note, 421; place of contract, 276; rebates, 421; representations as to health, 52; rescission of policy, 179; rights of assignee, 403; rights of pledges, 233; suicide, 313; words libelous per se, 313; vested rights, 89.
- Limitation of actions**—accounts, 457; amendment of pleadings, 439; application, 313; breach of warranty, 143; defense of set-off, 143; commencement of action, 215; computation of period, 143; conditional legacy, 179; delivery of deed, 143; executors and administrators, 70; fraudulent concealment, 403; liquor dealer's bond, 331; mortgages, 179; operation and effect, 52; pleading, 439; raising defense, 106; temporary absence, 161, 197.
- Logs and Logging**—certainty of contract, 17; conveyance with reservation of timber rights, 439; cutting timber, 421; sale of standing timber, 215; sale of timber, 52.
- Lost Instruments**—establishment, 475.
- Malicious Prosecution**—corporations, 233; malice inferred, 161, 197; probable cause, 439; want of probable cause, 179.
- Malpractice**—instructions, 89.
- Mandamus**—abuse of discretion, 276; enforcement of rights of stockholders, 385; injury to servant, 215; scope of relief, 161, 197; specific legal duty, 70; subjects of relief, 17; to courts, 106; trial to title to office, 367.
- Marriage**—burden of proof, 367; effect of insanity, 52; fees, 52; presumption, 367, 403.
- Master and Servant**—acts done in emergency, 439; assumed risk, 179, 313, 331, 367; assumption of risk, 70, 107, 161, 197, 293, 421; assurance of safety, 161, 197; care required of master, 293; collision between vehicles, 70; comparative negligence, 89; concurring negligence, 368; constitutional law, 161, 197; contributory negligence, 52, 89, 125, 313, 385, 457; control, 161, 197; dangerous structure 17; defective appliances, 233, 385; degree of care required, 293; delegation of duty, 475; duty of master, 70, 143, 385; duty to furnish adequate help, 293; duty to furnish safe appliances, 313; duty to instruct, 368; duty to observe defects, 215; duty to warn, 143; emergency, 70; equity of redemption, 89; evidence of negligence, 125; fellow servants, 215, 276, 313, 439, 457; fraudulent breach of contract, 457; incompetent fellow servant, 179; independent contractor, 70, 161, 197; injury to minor, 368, 457; intermission in performance of duties, 125; injury to railroad employee, 52; injury to servant, 17, 107, 179, 233, 293, 331, 385, 440; injury to third person, 107; laborers, 71; latent defects, 161, 197; liability for assault on third person, 385; liability for injury to servant, 52; liability for servant's torts, 233; limitations, 144; master's duty, 475; negligence, 52, 179, 215, 233, 276, 313, 385; negligence in loading car, 421; negligence of fellow servant, 293; negligence of independent contractor, 53, 368, 385; non-delegable duty, 313, 421; noon hour, 403; obvious dangers, 107; ordinary care, 161, 197; overtaking employee, 276; promise to repair, 276, 313; promise to repair machinery, 440; proximate cause, 89, 233, 457; public policy, 71; punitive damages, 403; questions for jury, 331; reliance on rules, 276; res ipsa loquitur, 17; provable cause, 293; rules governing employees, 421; safe appliance, 125; safe place to work, 35, 71, 233, 257, 313, 403, 440; scope of employment, 421; test as to master's liability, 35; torts of servant, 421; vice-principal, 89, 125, 368; volunteer act of servant, 385; warning of danger, 257; warning servant, 233.
- Mechanics' Lien**—authority to contract, 257; construction of statute, 179; deed as security, 276; foreclosure, 293; materialman, 233, 385, 403; notice, 161, 197; notice of intent to file, 257; payment of contractor, 457; personal judgment, 475; property subject, 179, 293; right of workmen, 313; right to lien, 17; statutes, 233; waiver, 403.
- Mines and Minerals**—association placer claims, 421; conveyance, 161, 197; estate in minerals, 143; injuries to real property, 17; leases, 179; minerals waters, 35; public lands, 368; revocation of license, 53; statutes, 53; subterranean waters, 35; tenants in common, 385.
- Money Paid**—foundation of action, 457.
- Money Received**—nature of action, 257.
- Monopolies**—contract in restraint of trade, 35; federal anti-trust statute, 17; patented articles, 35; public franchise, 53; purchase of stock of other corporation, 36; restraint of trade, 17; right to sue, 331; statutes governing, 17; violation of anti-trust act, 17; what constitutes, 421.
- Mortgages**—action to foreclose, 475; assumption of mortgage, 179; assumption of risk, 440; consideration, 293; contingent remainder, 457; covenants, 18; deed, 143; deed absolute, 89, 107; deed as security, 276; deed subject to, 125; default in payment of taxes, 331; duress, 331; ejectment, 161, 197; equitable right, 53; failure of consideration, 440; foreclosure, 179; hastening maturity,

403; indemnity mortgage, 403; limitation, 403; merger and revivor, 215; objection to appointment, 404; parol evidence, 197; priority, 257; purchase by junior mortgagees, 107; record as notice, 53; redemption, 36; renewal note, 53; res judicata, 18, 161; subsequently acquired property, 89, 215; title of conditional vendor, 421.

Municipal Corporations—abutting owner, 71; action on bond of official, 215; assessments for benefits, 257; assessments for improvements, 385; assessment for street improvement, 107, 144; change of grade, 331; city council, 257; constitutional debt limit, 257; construction of municipal ordinance, 53; contributory negligence, 331; corporate duty, 125; damages, 161; defective sidewalks, 36, 53, 385, 457; defective streets, 71, 107, 125; delegation of power, 440; duty toward fireman, 313; duty toward pedestrians, 331; easements in streets, 215; excavations in street, 161, 197; expulsion of officer, 440; fee in street, 276; fire limits, 404; illegal use of streets, 257; indemnity, 161, 197; injury on street, 276; injury to pedestrian, 36; intoxicating liquors, 422; knowledge as to defective streets, 215; licensee, 71; non-delegable powers, 475; notice, 125; obstruction in streets, 257, 313; power to grant franchise, 313; public improvements, 233, 257; question for jury, 313; regulation as to place of stopping cars, 385; res judicata, 197; restraining vacation of street, 475; revocable license, 161, 197; rights of common council, 403; use of streets, 293, 422; sidewalk obstruction, 475; special assessments, 404, 440; streets, 440; streets in newly-acquired territory, 276; taxpayer's action, 53; title to streets, 475; torts, 215; violation of ordinance, 404; water frontage of street, 215.

Names—definition of nickname, 368; idem sonans, 276; persons known by two names, 36.

Navigable Waters—definition, 440; littoral rights, 440; navigation, 107.

Negligence—acts in emergencies, 314; burden of proof, 36; choosing unsafe way, 368; concurring negligence, 107, 144, 314; conjecture cause, 276; contractual duty, 89; contributory negligence, 161, 179, 197, 215, 233, 475; dangerous condition, 53; defective premises, 258; degree of care required in sudden danger, 233; excavations, 71; explosion of coffee urn, 314; implied negligence, 258; imputable negligence, 71; imputed negligence of parent, 258; intoxication, 457; liability of manufacturer or vendor, 197; liability to third person, 89; lures to children, 125; pleading, 36, 71, 215; presumptions, 161, 197, 314; proximate cause, 18, 144, 161, 197, 331, 457; question of law and fact, 18, 385; railroad crossing accident, 457; res ipsa loquitur, 215, 404; subjects of proof, 36; trespass, 276; violation of speed ordinance, 331; violation of statute, 331; wanton negligence, 314; when a question for court, 475; willfulness, 125, 258.

New Trial—amending verdict, 293; as to one copy, 215; cold jury room, 144; continuance, 71; facts putting on inquiry, 215; general verdict, 440; grounds, 314; loss of records, 440; misconduct of jury, 89; newly discovered evidence, 125; prejudice of juror, 162, 197; quotient verdict, 144; raising question for defense, 89.

Notaries—negligence, 457.

Notice—sufficiency of service, 144.

Nuisance—abatement, 258; action for damages, 179; appliances in street, 107; injunction, 125, 458; noise in operation of railroad, 385; public service corporation, 458; words, 422.

Officers—term of office, 432; title to office, 215.

Parent and Child—abandonment, 475; custody of child, 422; earnings of child, 216, 276; right to child's earnings, 179; right to earnings, 368.

Parties—action to set aside, 233; joint obligation, 71; necessary parties, 475; partnership claim, 331.

Partition—necessary parties, 314; title, 125; voluntary partition, 144.

Partnership—accommodation paper, 293; acquiring adverse claim, 422; applying firm assets to individual debt, 179; collection of bills receivable, 258; confession of judgment, 368; creation of relation, 179; dissolution, 179; employing broker to sell business, 475; evidence, 368; existence of relation, 404; holding out, 162, 198; implied power of parties, 331; individual transactions, 125; intent of parties, 125; judgment, 89; liability, 162, 198; liability after expiration of corporate charter, 179; limited partnership, 216; notice of dissolution, 125; payment of individual debt, 18; personal liability, 475; purchasing goods on credit, 458; representation of firm by partner, 458; rights as to third person, 385; rights of partners, 107; rights of silent partner, 216; right of surviving partner, 368; sale of good will, 178; splitting cause of action, 331; what constitutes, 179.

Party Walls—consideration, 385; rights of parties, 331; right to rebuild, 314.

Patents—advertising card, 314; damages for infringements, 18; date of invention, 18; infringements, 314, 331; novelty, 332; priority, between inventors, 18; subjects of patents, 314.

Payment—application, 216; conditional order, 332; mistake of fact, 293, 422; note as payment, 216; place of payment, 314; recovery of money paid, 107, 258.

Penalties—degree of proof, 404.

Perpetuities—validity, 332.

Physicians and Surgeons—action for medical services, 476; degree of skill required, 293; malpractice, 162, 198.

Pleading—affirmative defense, 89; amendments, 107, 179; amendment to conform to proof, 332; answer as admission, 71; bill of particulars, 216; certainty, 53; conclusion of law, 332; counts, 125; declaration, 258; denials, 71; demurrer, 89, 179, 216, 332; error cured, 162, 198; failure of proof, 258; general demurrer, 71; motion, 162, 198; motion to strike, 18, 332; plea in bar, 126; purchase, 162, 198; recoupment, 126; release, 89; specific performance, 293; theory of action, 233; variance, 144, 476; verification, 107; waiver of defects, 71.

Pledges—insolvency proceedings, 89; liability of pledgee, 332, 440; liability of pledgor, 18; nature and essentials, 385; notes as collateral security, 53; rights of pledgee, 293; sale by pledgee, 90; sale of goods, 216.

Police Power—tax, 90.

Powers—life estate with power of disposition, 314; right to convey fee, 476.

Principal and Agent—action for both parties, 314; agents' acts and declarations, 294; agent to buy goods, 258; authority of agent, 356, 458; burden of proof, 126; declarations, 71; disclosure of principal, 126; existence of relation, 144, 458; knowledge of agent, 180; payment by surety, 53; power of attorney, 368; power to sell not power to pledge, 128; ratification, 216, 294; sale by agent to himself, 458; undisclosed principal, 314.

Principal and Surety—building contract, 18, 404; building contractor's bond, 180; compromise and settlement, 233; discharge of surety 233; liability of surety, 314; notice, 71; notice to sureties, 332; obligation of surety, 404; release of latter, 294; rights of surety, 216; strict construction, 90; unauthorized acts of agent, 458; usury as affecting discharge, 440.

Process—carrying passengers beyond station, 332; publications, 404; service, 162, 198.

Prohibition—excess of jurisdiction, 107.

Property—possession as evidence of latter, 294; standing timber, 144.

Public Lands—interest of partnership, 126; patentees, 90; surveys, 54; unlawfully inclosed, 440; what law governs, 332.

Quietling Title—invalid instruments, 386; persons entitled to maintain bill, 216; right of action, 440; right to relief, 314.

Quo Warranto—burden of proof, 162, 198; pleadings, 216; right to office, 386.

Railroads—accidents at crossing, 18, 233; authority of agency, 368; care of person at crossing, 107; care required of passenger, 422; carriage of passengers, 180; contributory negligence, 71, 476; conversion, 314; crossing, 126, 162, 198; crossing accidents, 180; defective appliance, 234; defective construction of crossing, 476; defective platform, 440; depot, 72; discovered peril, 90; dog, 126; duty of person driving across track 180; duty to heat station, 368; duty to look and listen, 53, 332; duty toward passenger, 476; excessive speed, 458; exemplary damages, 458; failure of carrier to stop for passenger, 386; failure to carry to destination, 368; failure to make flag stop, 458; failure to signal at crossing, 53; fences and cattle guards, 332; fires set by engine, 314; fire set by locomotive, 18; frightening horse, 422; injury at crossing, 53, 458; injury to adjoining land, 144; injuries to animals, 107; injury to child on track, 386; injury to licensee, 400; injuries to person at station, 458; killing stock, 54, 234; knowledge of passengers as to schedule, 332; limitation of liability, 216; negligence, 54, 234; negligence at crossing, 36; operation of train, 234; passengers, 18; passenger mislaying ticket, 332; penalty under safety-appliance act, 386; persons on track, 36; protection of passengers, 458; regulations, 162, 180, 198, 458; right of way, 180; safety gates 107; speed, 258; speed of train, 422; supervision by public officer, 36; ticket as a contract, 294; use of tracks by different companies, 422; warning, 162, 198; compensation, 276; finding of fact, 386.

Reformation of Instruments—clear proof, 72; description of premises, 144; equity, 72; mistake, 18, 54, 107, 476; pleading, 126.

Release—joint and several contract, 180.

Religious Societies—church buildings, 422; control of party, 54; incorporated societies, 180; nature and status, 258; orders governing party, 54.

Remainders—rights of remainderman, 258; vested and contingent, 144.

Removal of Causes—ancillary proceedings, 386; jurisdiction, 368; separable counts, 404; suit by aliens, 422; time of filing petition, 332.

Replevin—demand, 294; evidence, 72, 368; ownership, 422; property seized under execution, 404; title to goods, 458.

Sales—acceptance, 258; breach of contract, 36, 404; burden of proof, 234; breach of warranty, 216, 294; cancellation, 162, 198; completion of contract, 108; conditional sale, 216; consideration, 294; contract, 72; delivery, 162, 198, 276, 294, 332, 404; elements, 458; executory contract, 72; fraud, 368; implied warranty, 234; inadequacy of price, 144; inspection of goods, 386; lien for price, 216; machinery, 314; offspring of animal, 126; option contracts, 216; part performance, 180; patent defects, 72; rescission, 180, 234, 314; right to reclaim property, 386; stoppage in transit, 332; time for delivery, 332; time of payment, 234; time when title passes, 476; transfer of title, 386; verbal retention of title, 72; warranty as to title, 216.

Salvage—elements to determination of amount, 234.

Schools and School Districts—suspension of pupil, 54; trustees as officers of state, 386.

Seduction—divorcee, 90.

Set-Off and Counterclaim—assignment, 72; conversion of personal property, 368; definition, 126; privity of parties, 294; recoupment of surety, 332; statutory provisions, 36.

Sheriffs and Constables—trespass, 162, 198, 258, 458.

Shipping—authority of master, 18.

Specific Performance—building with restriction, 36; contracts enforceable, 332, 404; contracts made by agents, 458; contracts to deliver stock, 386; exchange of property, 332; laches, 144; marketable title, 162, 198; mutuality, 90, 258; notice, 162, 198; parol contract, 162, 198; right to remand, 108; statute of frauds, 234; verbal contract, 258.

States—delegation of power not possessed, 476.

Statutes—amending repealed statute, 458; amendment, 72; construction, 18, 36, 90, 162, 198; partial invalidity, 234, 386.

Stipulation—construction, 422; contract intended to defraud, 422; passing of title, 422; waiver, 90.

Street Railroads—authority of parties, 294; care required as to passengers, 36; care required in operating, 258; collision, 162, 198; collision with automobile, 36; contributory negligence, 258; defects in track, 54; discovered peril, 234; duty to look and listen, 180; duty toward trespasser, 476; frightening of horse, 332; injury to alighting passenger, 108, 180; knowledge of danger, 404; last clear chance, 162, 198; negligence, 36, 234, 458; operation of cars, 440; pedestrians, 90; right of traveler, 162, 198; sufficiency of tender of fare, 234; trenches dug by city, 404; use of streets, 216; vigilance of motormen, 368.

Subrogation—conveyance of mortgaged lands, 234; discharge of secondary liability, 216; indemnity bonds, 458; necessity for payment of debt, 144; sureties, 36, 238.

Sunday—conduct of business, 54; validity of contracts, 234.

Taxation—compulsory payment, 126; defenses, 108; double taxation, 90; earnings of property, 90; exemptions, 440; inheritance tax, 258; levy on judgment, 386; lien, 126; personal tax, 422; public lands, 216; recitals in tax deed, 126; sheriff's sales, 126; statutory construction, 90; subrogation, 126; tax sale, 458.

Telegraphs and Telephones—delay in delivery, 294; delivery of message, 126; failure to deliver message, 108; maintenance by individual, 54; power of state to regulate, 54; presentation of claims, 144; rules and conditions, 368.

Tenancy in Common—acquirement of adverse title, 108; adverse possession, 180; improvements by one tenant, 276; partition, 332; rights inter se, 458.

Tender—operation and effect, 36.

Territories—anti-trust legislation, 18.

Title—tenant, 37.

Torts—damnum absque injuria, 18; interference with business, 386; joint conversion, 294; joint feasons, 72; malicious interference with business, 18.

Towage—liability for injury to tow, 386.

Trade Marks and Trade Names—infringement, 54; meaning of, 368; nature if right, 180; unfair competition, 108, 404; who may acquire, 386.

Trade Unions—right to organize, 18.

Treaties—effect of ratification, 476.

Trespass—blasting, 108; injuries to personality, 404; possession, 294; prima facie case, 234; prima facie contracts, 234; spring guns, 386.

Trespass to Try Title—burden of proof, 162, 198; equitable title, 368.

Trial—direction of verdict, 54, 276, 404; disregarding testimony of witness, 422; failure to enter objection to evidence, 458; general verdict, 36; impeachment of one's own witness, 476; instructions, 54, 72, 126, 476; jury, 72; misconduct of juror, 108, 126; motion to strike out evidence, 422; objection, to evi-

dence, 404; question of law, 90; reception of evidence, 18, 476; separate verdict, 404; special interrogatories, 54; taking pleading to jury room, 476; weight and sufficiency of evidence, 404.

Trover and Conversion—demand, 144; measure of damages, 294; proof of, 90; right to sue, 422.

Trusts—absolute gifts, 476; accounting, 54; agreement to acquire mining claims, 234; consideration, 234; equitable jurisdiction, 216; express trust, 234; fiduciary relation, 126; foreclosure, 162; interest on bank deposits, 108; misconduct of jury, 126; purchase from trustee, 180; recovery, 198; resulting trusts, 422; rights of beneficiaries, 294; rights of third persons, 36; spendthrift trust, 144; statute of frauds, 216, 265; tenure of trustee, 36.

Turnpikes and Toll Roads—use by automobiles, 422.

Usury—concurrent covenants, 276; interest, 386; personal nature of defense, 180; recovery, 162, 198; what constitutes, 458.

Vendor and Purchaser—abstract of title, 216; acceptance of offer, 440; adverse possession, 332; bona fide purchaser, 422; bond for title, 180; breach of contract, 54, 144, 258; cancellation of contract, 180; concurrent covenants, 276; constructive notice, 180, 314; contract of sale without title, 404; denial of vendor's title, 180; diligence by vendee, 404; disaffirmance of contract, 386; duty to furnish abstract of title, 180; duty to return earnest money, 476; election of remedies, 90; equitable title, 90; failure to make deed, 234; property, 294; failure to record deed, 334; fraudulent representations, 294; joinder and wife, 276; marketable title, 422; merchantable title, 476; misrepresentations, 36, 386; notice, 108, 144; notice of defective title, 404; performance, 54, 144; provisions, 198; quit claim deeds, 54; record title, 386; recovery of land on default of payment, 368; rescission, 162, 198, 234, 294, 386; right of rescission, 90; rights under quit claim, 294; sale of land, 368; specific performance, 458; uncertainty in contract, 386; unrecorded deed, 162; words of purchase, 404.

Venue—dismissal as to some defendant, 72; quieting title to land, 36.

Warehouseman—advances, 90; storage of grain, 216; warehouse receipts, 386.

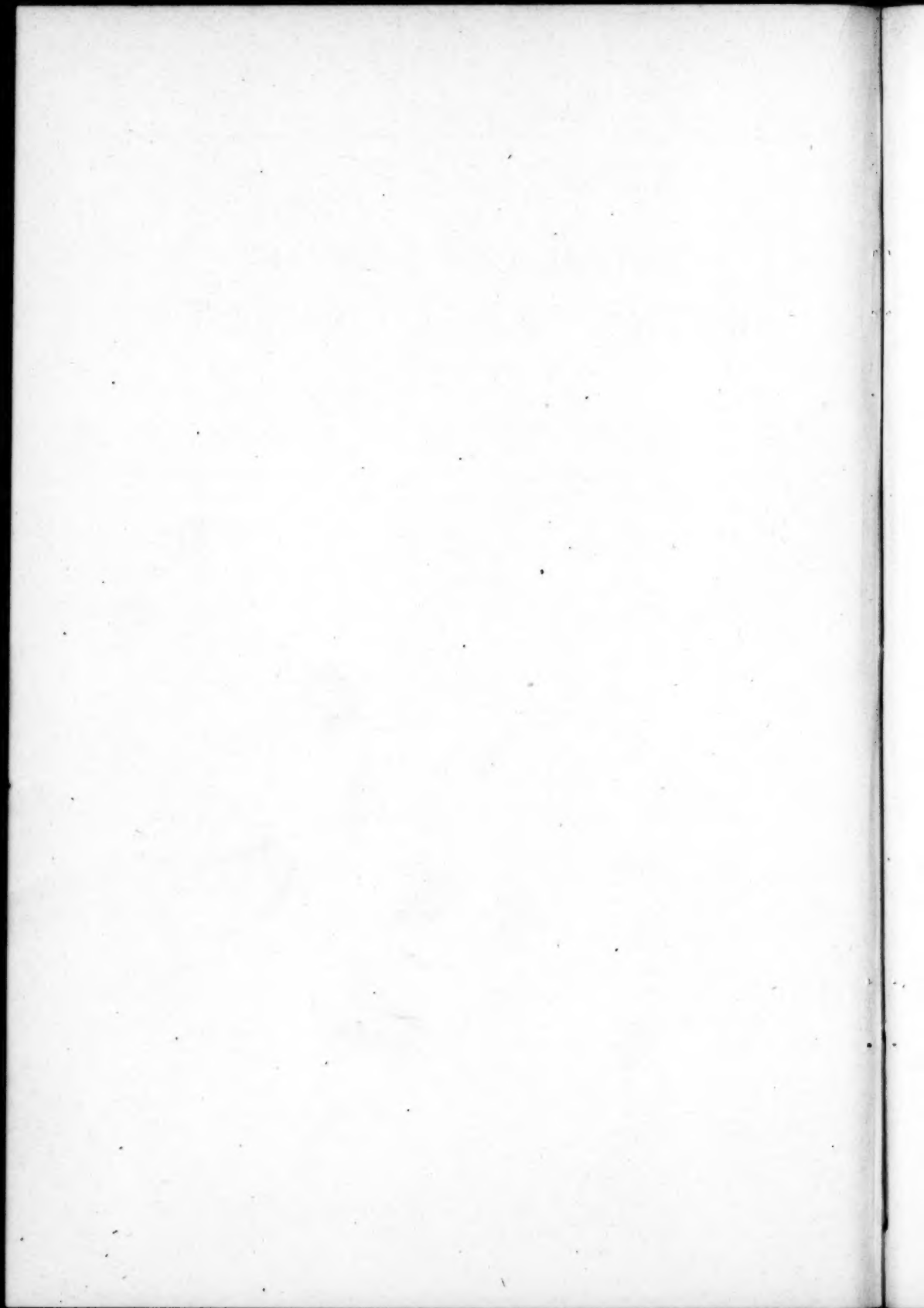
Waste—protection of mere expectancy, 314.

Waters and Water Courses—adverse possession, 476; drainage, 234; obstructing flow, 258; prior application, 126; subterranean channel, 108; surface waters, 180, 386; water rates, 476.

Wills—acceptance of legacy, 180; agreement not to revoke, 314; beneficiaries, 458; burden of proof, 54; construction, 36, 72, 90, 180, 216, 258, 422, 476; deeds, 180; devise 90; equity jurisdiction 294; estates created, 108; failure to sign, 144; forfeiture of legacy, 386; homesteads, 144; intention of testator, 276; interest of first wife, 314; jurisdiction, 72; parol evidence, 162, 198; propounder, 72; provisions against contest, 162; surrounding circumstances, 332; testamentary capacity, 234, 332; time from which will speaks, 234; validity of bequest, 54; what law governs, 234, 314; witnesses, 144.

Witnesses—contents of a letter, 126; credibility, 476; impeachment, 18; incompetency, 72; judicial knowledge, 72; spouses, 72.

Work and Labor—amount of recovery, 108; damages caused by excavation, 198; landowner, 162.



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